

IN THE MATTER OF THE POTENTIAL )  
PATTERN OF VIOLATIONS, INCLUDING )  
NOTICES OF VIOLATION N91-35-1-1 ) DOCKET NO. 92-041  
AND N91-26-7-2(#2), CO-OP MINING )  
COMPANY, BEAR CANYON MINE, ACT/015/025, ) CAUSE NO. ACT/015/025  
EMERY COUNTY, UTAH. )

**263-1396**

1 APPEARANCES

2  
3 CHAIRMAN: JAMES W. CARTER

4  
5 BOARD MEMBERS: ~~RAYMOND MURRAY~~  
6 JUDY F. LEVER  
7 DAVE D. LAURISKI  
8 E. STEELE MCINTYRE  
9 JAY CHRISTENSEN  
10 KENT STRINGHAM

11 STAFF MEMBERS:

12 JANICE L. BROWN, Secretary of the Board  
13 LYNDIA S. JENSON, Secretary  
14 THOMAS A. MITCHELL, Assistant Attorney General  
15 DR. DIANNE R. NEILSON, Director, Division of Oil,  
16 Gas and Mining  
17 RONALD J. FIRTH, Associate Director of Land Gas,  
18 Division of Oil, Gas and Mining  
19 LOWELL P. BRAXTON, Associate Director of Mining,  
20 Division of Oil, Gas and Mining  
21 FRANK R. MATTHEWS, Petroleum Engineer  
22 BRAD G. HILL, Geologist  
23 PAM GRUBAUGH-LITTIG, Permit Supervisor, Division of Oil,  
24 Gas and Mining

25 BUREAU OF LAND MANAGEMENT:

ASSAD N. RAFFOUL, Petroleum Engineer

FOR THE RESPONDENT: CARL KINGSTON, ESQ.

FOR NORTH EMERY

WATER USERS ASSOCIATION: JEFFREY APPEL, ESQ.

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1 SLC, UTAH, WEDNESDAY, OCTOBER 28, 1992, 10:30 A.M.

2 P R O C E E D I N G S

3 MR. CARTER: Well, as promised, that takes us back  
4 to agenda item number one. I don't see counsel for the  
5 Division in evidence yet, but let me call the matter up  
6 and we'll hear from Mr. Kingston and determine how we  
7 ought to proceed given these circumstances.

8 Now is the time and place set for hearing in Docket  
9 No. 92-041, Cause No. ACT/015/025 in the matter of the  
10 Board Order to Show Cause Re: Potential Pattern of  
11 Violations, Including Notices of Violation N91-35-1-1  
12 and N91-26-7-2 (#2), Co-Op Mining Company, Bear Canyon  
13 Mine, ACT/015/025, Emery County, Utah.

14 Appearing for the respondent in this matter is Mr.  
15 Carl Kingston and I'll wait for -- why don't you come  
16 forward Mr. Kingston, and I'm waiting now for a  
17 representative of the Division.

18 MS. LITTIG: We're driveling in.

19 MR. CARTER: Mr. Richards has joined us.

20 MS. LITTIG: Tom will be here momentarily.

21 MR. CARTER: All right. It appears that we're  
22 almost on track, if you'll indulge us another minute or  
23 two.

24 MS. LITTIG: Sorry, we just came from Third  
25 District Court.

1 MR. CARTER: You ran over from court.

2 Mr. Mitchell, this is timely. And appearing for the  
3 Division in this matter is Thomas Mitchell. Is there  
4 anyone else present who would like to be heard in  
5 conjunction with this matter?

6 MR. APPEL: Chairman Carter, I may wish to speak at  
7 the end.

8 MR. CARTER: Please identify yourself.

9 MR. APPEL: I'm with the North Emery Water Users  
10 Association and Castle Valley Special District Services.  
11 I would like to preserve my right to speak at the end.

12 MR. CARTER: That's Jeffrey Appel, for the record.  
13 That will be fine.

14 MR. APPEL: Thank you.

15 MR. CARTER: Anyone else?

16 MR. KINGSTON: I will have two witnesses,  
17 Mr. Chairman.

18 MR. MITCHELL: Are we ready, your Honor?

19 MR. CARTER: Let's -- we'll turn first to  
20 Mr. Mitchell. I understand this matter is before us on  
21 an appeal of administrative action by the Division or is  
22 this a --

23 MR. MITCHELL: No, it's not really an appeal.

24 MR. CARTER: All right.

25 MR. MITCHELL: The posture this comes to you in is

1 a review by the Division of a series of final N.O.V.'s  
2 which have been completed and, as you are aware, under  
3 the statute the Division is required periodically to  
4 review each operator's N.O.V.'s, determine whether or  
5 not there's a pattern of violations, so what's in front  
6 of you is the fact the Division has gone through that  
7 review and after going through that review has  
8 identified a number of N.O.V.'s which, as I say, are  
9 final which means that what you don't have in front of  
10 you is you don't have the facts of that N.O.V. in terms  
11 of are they true, are they not true, is the N.O.V.  
12 properly issued, not properly issued, were the points  
13 for negligence, et cetera correct, were the  
14 characterizations of the violation correct.

15 Those things are all -- I'll use the legal term  
16 res judicata. They're done. They're unappealed. They  
17 are final. The only thing you have in front of you is a  
18 review of the Division's essentially administrative bean  
19 counting, if you will, of numbers of N.O.V.'s  
20 relatedness. Relatedness is a factual issue and degree  
21 of negligence and the degree of negligence is in front  
22 of you. It's kind of hard to say exact -- in fact,  
23 nobody's ever done one of these before in the State of  
24 Utah, so we don't have a lot of history of this.  
25 Relatedness, as I say, is factual. The degree of

1 negligence, as I said, has been finalized in the  
2 N.O.V.'s so that's not an issue in front of you. I  
3 guess in the broad sense, looking at relatedness in  
4 terms of the final assessment which is, as I say, final  
5 and unappeal of negligence is probably relevant to some  
6 degree in terms of relatedness.

7 What I am going to do today is I'm going to put on  
8 testimony and put documents in front of you through  
9 Joe Helfrich. Essentially what they're going to be, I'm  
10 just going to give you a little road map in advance.  
11 The first is going to be a computer printout during the  
12 relevant time period from the Division's data base which  
13 tracks N.O.V.'s for this purpose and the rule and  
14 solvent rule and statute concerning the pattern of  
15 violation.

16 Then I will give you three N.O.V.'s which were  
17 issued and which were finalized and not appealed. Then  
18 I will give you the document which triggered the  
19 Division's actions with regard to Co-Op from the  
20 director who went along with the agent for Co-Op.  
21 Mr. Owens' response seeking a hearing, informal hearing  
22 on this matter, internal memorandum which essentially  
23 shows you the procedure which is neither rule nor  
24 statute but rather internal procedure followed.

25 Then the -- I will give you the document which was

1 -- set the hearing for the potential pattern, and then  
2 finally I will give you the findings document which is  
3 nothing more than the agency's findings to this point on  
4 which you must make your determination.

5 MR. CARTER: All right. And I think that it's  
6 probably clear to everyone involved that the State will  
7 have the burden of going forward and making a  
8 prima facie case for the relief at the request of the  
9 Board. Mr. Kingston, do you want to make a preliminary  
10 opening statement?

11 MR. KINGSTON: Just briefly, Mr. Chairman. We do  
12 dispute the basis upon which Mr. Mitchell is asking the  
13 Board to make a determination, specifically with the  
14 findings of negligence in this case. The regulation, I  
15 think, is quite clear that the Board, not the Division  
16 but the Board has to find that each one of the  
17 violations considered here did occur and that the  
18 negligence factor was unwarrantable or wilful.

19 Now if, as Mr. Mitchell supposes or presents, it is  
20 simply a matter of saying that's no longer an issue  
21 because it wasn't appealed and the Division has already  
22 made that determination, then the Board just as well  
23 close up shop. The Board under the regulations has to  
24 determinate at least one of these violations at issue  
25 today did occur and that the named factor is wilful or



1 unwarrantable.

2 MR. CARTER: All right.

3 MR. MITCHELL: We can save that part.

4 MR. CARTER: Right. Okay, Mr. Mitchell, proceed.

5 MR. MITCHELL: I'd like to swear my witness,  
6 please.

7 JOSEPH C. HELFRICH,  
8 having been duly sworn was examined and testified  
9 as follows:

10 EXAMINATION

11 BY MR. MITCHELL:

12 Q. Joe, I'd like you to speak into this  
13 microphone so everyone can hear you. Would you please  
14 state your full name and your position?

15 A. Joseph C. Helfrich; Regulatory Program  
16 Coordinator for the Division.

17 Q. Joe, what do you do with regard to patterns,  
18 if anything, in your employment with the Division of  
19 Oil, Gas and Mining?

20 A. I'm responsible for making the initial  
21 determination of three or more same or similar  
22 violations which would initially constitute a pattern of  
23 violations.

24 MR. CARTER: Could I get you to move the microphone  
25 real close? Great.

1 THE WITNESS: Better? Okay.

2 BY MR. MITCHELL:

3 Q. Do you, in the course of your employment, keep  
4 a data base of final N.O.V.'s which have been appealed  
5 and upheld or not appealed and made final?

6 A. Yes, I do, and I make monthly evaluations of  
7 that data base.

8 MR. MITCHELL: I believe we have premarked Exhibits  
9 1 through 9 and I'm going to have those passed out.

10 MR. CARTER: Mr. Kingston, have you been provided  
11 with a copy of these documents?

12 MR. KINGSTON: I have not.

13 MR. CARTER: We need at least another set.

14 MR. MITCHELL: I think we're set to do that.

15 MR. CARTER: Okay, good.

16 (Whereupon Exhibit No. 1 was  
17 marked for identification.)

18 BY MR. MITCHELL:

19 Q. I ask you to look at what has been marked as  
20 the Division's Exhibit No. 1 and tell me what it is?

21 A. That is a computer printout which reflects the  
22 number of same or similar violations that have occurred  
23 at a particular mining entity within the 12 month  
24 period.

25 Q. How are we able to determine that? Is the ACT

1 number 015/025 the permit number assigned to Co-Op?

2 A. That is correct.

3 Q. And is that how you track it in your data  
4 base?

5 A. Yes.

6 Q. Attached to that is a copy of a portion of the  
7 Board's rules and the State coal statute. Are these the  
8 rules and statute that you looked at in performing your  
9 evaluation of same or similar?

10 A. Yes.

11 Q. When you did that, did you reach any  
12 conclusions during the time period from 12-1-90 through  
13 1-1-92?

14 A. Yes, I did.

15 Q. And what did you determine?

16 A. That the computer printout led me to believe  
17 that there were three violations of the similar nature  
18 that had occurred at the Co-Op Mining Company's Bear  
19 Canyon Mine.

20 Q. And would you tell me what N.O.V. numbers  
21 those represented?

22 A. No. N91-35-1-1, No. N91-20-1-1 and No.  
23 N91-26-7-2, violation two of two.

24 MR. LAURISKI: What was the first one you said?

25 THE WITNESS: N91-35-1-1.

(Whereupon Exhibit Nos. 2 - 4  
were marked for identification.)

BY MR. MITCHELL:

Q. I show you Exhibits 2, 3 and 4 and ask you if  
you've seen those before?

A. Yes, I have.

Q. And what are they?

A. They are written copies of the notices of  
violation issued to Co-Op Mining Company.

Q. With regard to Exhibit No. 2, what is the  
status of that Notice of Violation?

A. That violation has been finalized.

Q. And what was it written for?

A. This violation was issued for the permittee's  
failure to conduct reclamation and mining activities in  
accordance with the approved plan.

Q. In fact, what actually did the permittee do  
that he was cited for?

A. This resulted from the failure to include a  
detail description of each road, instruction --  
constructed, used or maintained within the permit area  
and failure to remove topsoil from the area being  
disturbed.

Q. In other words, he built a road without  
putting it in his plan first?

1 A. Yes.

2 Q. With regard to Exhibit No. 3, what was this  
3 N.O.V. written for?

4 A. This Notice of Violation was written for the  
5 permittee's failure to operate in accordance with the  
6 terms and conditions of the permit and all applicable  
7 standards and requirements and State programs,  
8 specifically failure to submit all information required  
9 by a Division worker.

10 Q. In just plain language, why did they receive  
11 this N.O.V.?

12 A. There were a number of outstanding permittee  
13 conditions the operator didn't address.

14 Q. In other words, there was a conflict between  
15 what was required under the -- what the plan needed to  
16 reflect and what needed to be on the ground between the  
17 two of those -- those two things?

18 A. Yes.

19 Q. And was that N.O.V. finalized and unappealed?

20 A. Yes.

21 Q. With regard to Exhibit No. 4, can you tell me  
22 what that is?

23 A. This is a written copy of Notice of Violation  
24 91-26-7-2.

25 Q. And what was it written for?

1           A.    Violation two of two which is the subject of a  
2 pattern determination.

3           Q.    And that's the third page of Exhibit 3?

4           A.    Yes.  That was written for the permittee's  
5 failure to obtain Division approval before enlarging the  
6 shop pad.

7           Q.    In plain language does that mean that he  
8 enlarged the shop pad without changing his permit and  
9 getting Division approval of the shop application of his  
10 plan and permit to do so?

11          A.    That is correct.

12          Q.    And what -- as to the three of these N.O.V.'s  
13 represented by Exhibits 2, 3 and 4, what about them  
14 caused you to believe that there may be the potential  
15 for a pattern?

16          A.    The similarity of the three violations was  
17 reflected in the permittee's failure to conduct mining  
18 reclamation operations in accordance with his approved  
19 permit.

20          Q.    In plain English is that another way of saying  
21 he did things on the ground without modifying his permit  
22 in advance of doing it?

23          A.    That is correct.

24          Q.    In other words, he had nothing in his permit  
25 or his plan that allowed him to do that but he went

1 ahead and did it first anyway?

2 A. Correct.

3 (Whereupon Exhibit No. 5 was  
4 marked for identification.)

5 BY MR. MITCHELL:

6 Q. Showing you Exhibit No. 5, I notice that  
7 you're not the author of that but have you seen it  
8 before?

9 A. Yes, I have.

10 Q. And is that something that in your function  
11 with the Division you would be copied on and use to keep  
12 a record of a patterns proceeding?

13 A. Yes, it is.

14 Q. And what was the purpose of this letter?

15 A. The purpose of this letter was to provide  
16 representatives from Co-Op Mining Company, in this  
17 particular case, Mr. Owen -- actually, to notify him  
18 that there were potential patterns of violation in his  
19 mining operation.

20 Q. And did it reference a number of N.O.V.'s?

21 A. Yes, it did.

22 Q. Did it reference any of the N.O.V.'s, which of  
23 the three which we just discussed?

24 A. Yes, it represented each of those.

25 Q. Did Co-Op respond?

1 A. Yes, they did.

2 (Whereupon Exhibit No. 6 was  
3 marked for identification.)

4 BY MR. MITCHELL:

5 Q. And I ask you to look at Exhibit No. 6. Is  
6 this the response to the Division's raising that concern  
7 with Co-Op?

8 A. Yes, it is.

9 (Whereupon Exhibit No. 7 was  
10 marked for identification.)

11 BY MR. MITCHELL:

12 Q. I ask you to look at Exhibit No. 7. Are you  
13 familiar with that?

14 A. Yes, I am.

15 Q. Does that show that it was copied to you?

16 A. Yes, it does.

17 Q. And is this also a document that you keep in  
18 the course of your function regarding review of patterns  
19 of violations?

20 A. Yes, it does.

21 Q. And what is the purpose within the program of  
22 this document?

23 A. The purpose of this document is to let the  
24 director of the Division know that there is potential  
25 pattern of violations and the violations have all been



1 finalized.

2 Q. And who is Lowell Braxton?

3 A. He is the Associate Director for the Division  
4 of Oil, Gas and Mining.

5 Q. Is he your immediate superior?

6 A. Yes, he is.

7 Q. And does he communicate with the director? Do  
8 you communicate with the director of these issues  
9 through your superior Lowell Braxton?

10 A. Yes, I do.

11 Q. Attached as a multi-page document to Exhibit 7  
12 behind this memorandum is a -- something entitled  
13 Procedure for Determination of Pattern Violations. Are  
14 you familiar with that document?

15 A. Yes, I am.

16 Q. And is this -- to your understanding and doing  
17 your job regarding patterns of violation, does this set  
18 out the procedure that the Division follows for  
19 determining a pattern of violations?

20 A. Yes, it does.

21 Q. And was this attached to the memorandum from  
22 Lowell Braxton to the director for her use in  
23 determining whether there was a potential pattern of  
24 violations?

25 A. Yes, it was.

1           Q.    At the end of document No. 7, there's also a  
2 document typed to Lowell Braxton from yourself dated  
3 July 25, 1991. Was that the document which you provided  
4 to your superior to begin the process of review by the  
5 director and your superior?

6           A.    Yes, it was.

7           Q.    Below that there -- it says Co-Op Mining  
8 Company and then shows violation issue dates and the  
9 nature of violations, including who the inspector was,  
10 the status, whether it was appealed or not appealed, and  
11 the negligence assigned at the time that the penalties  
12 were assessed; is that correct?

13          A.    Yes.

14          Q.    Is that a true and accurate representation of  
15 who the inspector was, what the status was regarding the  
16 appeal, non-appeal and how many negligence points were  
17 attached for purposes of penalty?

18          A.    Yes, it was.

19          Q.    Are negligence points something which may be  
20 appealed by an operator prior to a penalty becoming  
21 final?

22          A.    Yes, they are.

23          Q.    Do they have two opportunities to appeal that?

24          A.    Yes, they do.

25          Q.    Is the first opportunity in the informal

1 context with the Division?

2 A. Yes, it is.

3 Q. And is the second if they disagree with that  
4 for any reason they have the opportunity to complete a  
5 de novo hearing before the Board?

6 A. Yes, it is.

7 Q. Were any of these appealed to the Board?

8 A. No, they were not.

9 (Whereupon Exhibit No. 8 was  
10 marked for identification.)

11 BY MR. MITCHELL:

12 Q. I'll show you now Exhibit No. 8 and ask you if  
13 you are familiar with that?

14 A. Yes, I am.

15 Q. Is this a document which you would keep in the  
16 course of your employment with the Division?

17 A. Yes, it is.

18 Q. And what is it?

19 A. It's a letter addressed to Wendell Owen and  
20 Co-Op Mining Company from Dr. Dianne Nielson, Director  
21 of the Division.

22 Q. And what is -- what function does it provide?

23 A. It lets Mr. Owen know that the Division is of  
24 the opinion that there is a potential pattern at his  
25 Bear Canyon operation.

1           Q.    In other words, the Division -- the Director  
2 of the Division, after reviewing your work, your  
3 superior's work and the subject N.O.V.'s, has --  
4 determines that there's reason to believe that the  
5 permittee has incurred three or more violations and the  
6 same related requirements of the State program of permit  
7 during a 12 month period?

8           A.    Yes.

9           Q.    And that based upon the record that each of  
10 those violations individually was caused by a permittee  
11 either wilfully or through unwarranted failure to comply  
12 with the requirements of the law?

13          A.    That is correct.

14          Q.    And are you aware whether or not this document  
15 was sent to Mr. Owen?

16          A.    Yes, I am.

17          Q.    And was it sent?

18          A.    Yes, by certified mail.

19          Q.    In response to that, did anything further  
20 occur?

21          A.    Yes, it did. On July 8th of 1992 there was an  
22 informal hearing held at the Division of Oil, Gas and  
23 Mining office providing Mr. Owen the opportunity to  
24 speak to the three violations identified in the  
25 potential pattern.

1 Q. And he brought -- was able to bring witnesses  
2 and other people who he thought would be helpful?

3 A. That is correct.

4 Q. And he was represented by counsel at that  
5 time?

6 A. Yes, he was.

7 Q. As a result of that informal hearing, was  
8 there a final conclusion and order issued by the  
9 Division?

10 A. Yes, there was.

11 (Whereupon Exhibit No. 9 was  
12 marked for identification.)

13 BY MR. MITCHELL:

14 Q. And I now ask you to look at Exhibit No. 9.  
15 Are you familiar with that?

16 A. Yes, I am.

17 Q. What is it?

18 A. It's a findings document prepared by the  
19 director regarding potential pattern of violations here  
20 in July 8, 1992.

21 Q. And in plain language what did the -- what did  
22 this document find and conclude?

23 A. That there was a pattern at Co-Op Mining  
24 Company's Bear Canyon Mine.

25 Q. And with regard to the three N.O.V.'s which we

1 were looking at for that purpose, what did they  
2 determine with regard to those three? Did all three  
3 hold up? Did one drop out? What happened?

4 A. Three violations remained in place; however, a  
5 determination reflected that only two of them were  
6 similar to each other and the third one was of a  
7 different nature.

8 Q. And so the Division dropped out one of them  
9 and made a finding regarding two of them that there was  
10 a pattern; is that correct?

11 A. That is correct.

12 Q. And what N.O.V.'s did he determine constituted  
13 the pattern?

14 A. N91-35-1-1 and N91-26-7-2, violation two of  
15 two.

16 MR. MITCHELL: Mr. Chairman, I'd move to admit  
17 Exhibits 1 through 9.

18 MR. KINGSTON: No objection.

19 MR. CARTER: All right, they'll be admitted.

20 MR. MITCHELL: I have nothing further in the way of  
21 evidence to put at this time.

22 MR. CARTER: Let me allow Mr. Kingston to ask  
23 Mr. Helfrich any questions he's got. Mr. Kingston?

24 EXAMINATION

25 BY MR. KINGSTON:

1           Q.   Mr. Helfrich, with regard to the violation  
2 that was not considered a requirement pattern, your  
3 testimony was that the reason it was not was because it  
4 was not similar to the other two. In fact, in the order  
5 identifying that the degree of negligence would not  
6 constitute wilfulness or an unwarrantable failure on  
7 that other N.O.V.?

8           I think you'll find that language on page six right  
9 towards the bottom.

10          A.   That's correct.

11          Q.   You didn't write any one of those three  
12 violations, did you, Mr. Helfrich?

13          A.   No, I did not.

14          Q.   Are you familiar with the circumstances that  
15 led up to the issuance of those violations or did you  
16 simply review the records that were in your office?

17          A.   I did both.

18          Q.   On Exhibit No. 3, if you'll turn to that one  
19 then, you testified that the reason that one was written  
20 was because there were a number of permitting  
21 obligations that hadn't been addressed. What particular  
22 permitting obligations had not been addressed?

23          A.   Without getting into the exact description,  
24 which I'm not familiar with, they were the subject of a  
25 Division order. That Division order outlined a number

1 of items that the permittee had -- allegedly had not  
2 addressed and, as a result, was the subject of  
3 violation. They are identified on Exhibit 5 as numbers  
4 eight, 14, 17 and 18.

5 Q. I'm looking at Exhibit No. 5. Can you direct  
6 my attention to where you're referring to?

7 A. To the five -- I believe your question was  
8 with regard to the particular violation that was issued  
9 for not complying with the Division order.

10 Q. That's right. And what my question to you  
11 is: What were those requirements that had not been  
12 addressed?

13 A. I don't know the specificity of them, only by  
14 reference to the number, and that's on page three of  
15 Exhibit 3.

16 Q. Do you know the specificity of the negligence  
17 factor on either one of the other two violations that  
18 were issued?

19 A. One with regard to negligence, they were  
20 assessed and upheld in a greater degree, and I don't  
21 know the exact point value that was finally assigned to  
22 each one.

23 Q. Do you know the process that was used by those  
24 when you evaluated the negligence factor to determine  
25 what degree of negligence was present?



1 A. Yes, I do.

2 Q. Were you present when that was done?

3 A. Yes, I was.

4 Q. On the violation dealing with the road, what  
5 conditions existed that would constitute a wilful or an  
6 unwarrantable finding in that particular N.O.V.?

7 A. The factors that would qualify for a greater  
8 degree of negligence in that sense would be if there  
9 were a violation of a specific permit condition, if the  
10 permittee had a prior knowledge of the situation, if the  
11 permittee had been issued a violation prior to that  
12 particular time and when the problem was identified, or  
13 if there had been any documents or communication to the  
14 permittee prior to any issuance of the violation.

15 Q. Let's go just to the last factor. You  
16 mentioned any documents given to the permittee prior to  
17 that will put them on notice. What document was given  
18 to the permittee prior to that violation being issued  
19 that would put them on notice?

20 A. I don't know.

21 Q. Let's go to the one on the so-called existence  
22 of the pad area. What factors were involved in the  
23 issuance of that N.O.V. that would lead you to believe  
24 that there was a greater degree of negligence than  
25 ordinary negligence?

1           A.    The same ones previously stated.

2           Q.    Can you give me any specifics as to what  
3 documentation would have been given prior to putting  
4 them on notice?

5           A.    No.   That would have been completed in the  
6 very early stages of the assessment of a Notice of  
7 Violation that has come to a conclusion under the  
8 appeals process.

9           MR. KINGSTON: I have no further questions.

10          MR. CARTER: All right. Mr. Mitchell?

11          MR. MITCHELL: Nothing further.

12          MR. CARTER: Mr. Kingston? I assume then that  
13 that's the State's case in chief and I can allow  
14 Mr. Kingston to proceed with his case of witnesses.

15          MR. MITCHELL: That's correct.

16          MR. CARTER: All right, Mr. Kingston.

17          MR. KINGSTON: Mr. Chairman, the regulations  
18 clearly provide that at such hearing, this being the  
19 hearing that I'm reading from, R45400-335.100, at such  
20 hearing the Division will have the burden of  
21 establishing a prima facie case for suspension or  
22 revocation of a permit based upon the clear and  
23 convincing evidence.

24                I would submit that the clear and convincing  
25 evidence has not been presented that there was any

1 degree of negligence at all regarding these and the  
2 Order to Show Cause ought to be dismissed and relief  
3 sought by the Division ought to be denied.

4 MR. CARTER: All right. Mr. Mitchell? I  
5 anticipate we'll take this motion to dismiss under  
6 advisement and probably ask you to continue with your --  
7 whatever evidence you'd like to put on. But,  
8 Mr. Mitchell, do you want to counter that argument?

9 MR. MITCHELL: I'd submit it. The record is  
10 clear. These are final N.O.V.'s. The operator received  
11 notice of them when they were proposed in the complaint  
12 and agreed that that was a correct statement of the  
13 degree of negligence. The facts in that case, the  
14 violation, every element of this has had an opportunity  
15 to be tried to different levels, at each point that with  
16 regard to all of these they have been allowed to go  
17 final.

18 These people have stipulated that these can be  
19 final documents, final findings by the Division which  
20 have the affect of a finding by the Board. Of course,  
21 if they weren't appealed to the Board and now for the  
22 first time what we hear is essentially, well, gee if  
23 there's a consequence to these maybe we'd like to,  
24 sometime after the fact, now get in and reargue it for  
25 the first time. In fact, it's not even reargue. They

1 never argued it, and, of course, that's why you have  
2 distinct periods of time in which to appeal or not  
3 appeal because if you don't, then you would never know  
4 when you can rely upon something becoming final and you  
5 would never be able to review for purposes of a pattern  
6 because things would never become final.

7 The pattern situation only looks at and evaluates  
8 those which would become final for the underlying facts  
9 concerning negligence. The actual act that occurred,  
10 whether it was a violation, have all become final.  
11 There's no disagreement among the parties concerning  
12 those facts.

13 MR. CARTER: Okay. This is a legal argument as  
14 opposed to a factual argument so I'm going to rule at  
15 this point that we will take your Motion to Dismiss  
16 under advisement and re-read the rule and reach a  
17 determination as to whether or not the Division has met  
18 its burden, but I'll -- having done that, we'll turn to  
19 you to produce any rebuttal testimony or whatever  
20 testimony you'd like to place in the record.

21 MR. KINGSTON: Thank you, Mr. Chairman. I would  
22 ask that Kim Mangum be sworn as a witness.

23 MR. CARTER: All right. Do you have more than one  
24 witness because we can swear them both at the same time,  
25 if that's all right.

1 MR. KINGSTON: Yes, that would be appropriate. I  
2 do have witnesses I'll be calling today.

3 MR. CARTER: Okay. If you gentlemen will both  
4 stand up.

5 KIMLY MANGUM,  
6 having been duly sworn was examined and testified  
7 as follows:

8 EXAMINATION

9 BY MR. KINGSTON:

10 Q. Mr. Mangum, please state your full name and  
11 your address?

12 A. My name is Kimly, K-I-M-L-Y, C. Mangum, and I  
13 live at 388 East Boynton Road; Kaysville, Utah 84 --

14 Q. What are -- go ahead.

15 A. 84037.

16 Q. What is your occupation, Mr. Mangum?

17 A. I'm a licensed civil structural engineer.

18 Q. And just briefly can you tell me what  
19 education you have and any degrees that you've received?

20 A. I received a Bachelor's of Science in civil  
21 engineering in 1982; I subsequently worked on a masters  
22 degree for graduate work for a year and a half; later I  
23 entered back into the university and received a masters  
24 for architecture.

25 Q. Are you acquainted with Co-Op Mining Company?

1 A. Yes.

2 Q. What is your relationship to Co-Op Mining  
3 Company?

4 A. I am an engineering consultant for the Co-Op  
5 Mining Company.

6 Q. In that capacity do you interact with the  
7 inspectors that are sent down by the Division of Oil,  
8 Gas and Mining and other personnel that may be employed  
9 by the Division?

10 A. Yes.

11 MR. CARTER: Could I ask you to move the two  
12 microphones over so Mr. Mangum has one and you have  
13 one? Thank you.

14 BY MR. KINGSTON:

15 Q. And when you're doing that, Mr. Mangum, do you  
16 deal with notices of violation that are issued from time  
17 to time by the inspectors from the Division?

18 A. Yes.

19 Q. I'm going to draw your attention to N.O.V.  
20 N91-35-1-1. That was briefly described as a violation  
21 dealing with the construction of a road prior to the  
22 time that a permit was obtained for that construction.  
23 Are you familiar with that N.O.V.?

24 A. Yes, I am.

25 Q. Are you familiar with the circumstances of the

1 events that led up to the issuance of that N.O.V.?

2 A. Yes, I am.

3 Q. What were those events?

4 A. There was discussion -- I had discussion with  
5 Mr. Wendell Owen in the fall of 1990 concerning some  
6 activities. They were going to be doing some  
7 construction near the port hole and there may be some  
8 revisions to the plan required.

9 There was that discussion on that issue at one  
10 time. It was not continued. And then -- I mean, I  
11 received no more notice from Co-Op concerning that until  
12 there was -- the violation was written concerning the  
13 road which the Division wrote a violation on.

14 Q. Are you familiar with the person who  
15 constructed that road, who did the grading?

16 A. Yes, I understand it was Kevin Peterson.

17 Q. Are you familiar with him?

18 A. Yes. Yes, I know him.

19 Q. Have you had occasion to do any work with him  
20 in the past there at the Co-Op Mining Company?

21 A. Yes, I have worked with him.

22 Q. Based on your experience in the past, has he  
23 been one that regularly has followed your instructions  
24 that are given to him regarding the performance of a job  
25 that he's doing?

1           A.    Yes, I would say so.

2           Q.    I don't suppose you were there when the actual  
3 road was cut, were you?

4           A.    No, I was not.

5           Q.    Some testimony was given regarding that  
6 violation, that part of this problem was that topsoil  
7 was not removed. Can you describe the area that is  
8 involved, where this road was constructed?

9           MR. MITCHELL: Your Honor, I'm going to object and  
10 the reason I'm objecting is that this is clearly going  
11 to was the N.O.V. properly issued, was the final  
12 assessment the right level of assessment, and unless  
13 they appealed that in a timely fashion, they should not  
14 be allowed now, long after the time to appeal, long  
15 after the time to make a record on this issue has  
16 passed, and we're not prepared to do a de novo review of  
17 something that's been final at which one point in time  
18 the statute of the rules provided for an appeal was not  
19 appealed. We're here simply to put the final records in  
20 front of the Board.

21           MR. CARTER: Let me -- I think that I need to  
22 distinguish between a couple of different issues that  
23 have cropped up. I think we've taken under advisement  
24 Mr. Kingston's Motion to Dismiss based upon his  
25 assertion that the State has not proven separately



1 either wilful or -- I can't remember the other word,  
2 hasn't proven the standard of negligence that's required  
3 in order to find a pattern of violations.

4 I understand the State's argument to be we're  
5 railing on the determinations that were originally made  
6 and don't believe that we're required to reprove the  
7 levels of negligence. What I'm going to do is I'm not  
8 going to sustain your objection, except to the extent  
9 that I don't think it's appropriate to re-open the  
10 N.O.V.'s in their entirety.

11 I think that your motion goes to the negligence  
12 aspect of the issuance of the N.O.V.'s and the  
13 violations that took place, so I'm going to sustain  
14 Mr. Mitchell's objection with regard to this being a  
15 collateral attack on the fact of the violation. I don't  
16 believe that it's appropriate for the Board to entertain  
17 a determination of whether they were properly issued or  
18 not, but I will allow you to continue to provide  
19 evidence or testimony with regard to the degree of  
20 negligence.

21 MR. KINGSTON: Okay.

22 MR. MITCHELL: Can I simply point out just so that  
23 my objection is clear on the record?

24 MR. CARTER: Yes.

25 MR. MITCHELL: That this level of negligence was

1 reduced to a sum of money which was paid by Co-Op and  
2 that just as you can appeal the factor violation, you  
3 can appeal the penalty, and both of those are collateral  
4 attacks on the final judgment.

5 MR. CARTER: And I'll take that under advisement,  
6 as well. We'll consider that as we're considering  
7 Mr. Kingston's objection or Motion to Dismiss. In fact,  
8 I do want to allow Mr. Kingston the opportunity to put  
9 on the record whatever testimony he thinks is  
10 appropriate with regard to negligence.

11 I don't -- I guess I need to review the rules  
12 again, but I don't read negligence as being absolutely  
13 synonymous with wilful. I understand the State's  
14 position is --

15 MR. WILLIAMS: I agree, but I think that that is  
16 argument, not fact, as to what amount of negligence  
17 constitutes wilful and unwarranted. That's an  
18 argument. The facts are the facts.

19 MR. CARTER: All right.

20 MR. MITCHELL: The facts have occurred. They've  
21 been reduced to a final judgment. He can argue about  
22 whether that degree of negligence, which is a matter of  
23 fact within the range of possible negligence that could  
24 have been found, that they could have argued that  
25 earlier, whether that constitutes, but I think to

1 reargue the amount that's of negligence that was found  
2 earlier as a factual matter is a collateral attack on a  
3 factual finding, as well.

4 MR. CARTER: I agree. And to that extent, again,  
5 I'll sustain your objection, but I do believe  
6 Mr. Kingston's entitled to rebut the State's argument or  
7 evidence that these activities were either wilful or --

8 MR. KINGSTON: Unwarranted.

9 MR. MITCHELL: Unwarranted.

10 MR. CARTER: -- unwarranted through whatever  
11 testimony he'd like to put on at this point. But thank  
12 you. We have both objection -- the objection and the  
13 Motion to Dismiss under advisement so we'll sort this  
14 out.

15 MR. LAURISKI: Mr. Chairman, I think there's one  
16 additional thing here beyond the fact of  
17 unwarrantability and wilful and that's the fact of  
18 similarity between the two violations that remain in  
19 question to determine that pattern of violation.

20 I think we have to understand what similarities  
21 exist before we can make a determination as to whether  
22 or not there, in fact, was a pattern of violations.

23 MR. MITCHELL: I agree with that.

24 MR. CARTER: I anticipate Mr. Mitchell's going to  
25 make that argument as his closing argument. Again, that

1 would be interpretation of the statute and the rules.

2 MR. MITCHELL: And the final facts embodied in the  
3 N.O.V.'s and final assessments.

4 MR. CARTER: All right. I think -- are we all  
5 clear?

6 MR. KINGSTON: I believe so, Mr. Chairman.

7 MR. CARTER: All right. Mr. Kingston, go ahead.

8 BY MR. KINGSTON:

9 Q. Since you were not present when the road was  
10 cut and don't have firsthand knowledge of exactly what  
11 happened there, Mr. Mangum, let's move on to the N.O.V.  
12 N91-26-7-2 of number two of two.

13 This is the one that dealt -- this is the N.O.V.  
14 that dealt with what was called the enlargement of a pad  
15 area. Are you familiar with that N.O.V.?

16 A. Yes, I am.

17 Q. Can you describe the events that led up to the  
18 issuance of that N.O.V.? And, Mr. Chairman, this does  
19 get into the negligence factor, as well as the other  
20 aspect of the pattern part.

21 MR. CARTER: All right.

22 THE WITNESS: During a review of the mine permit  
23 application or the permit there was a re-evaluation of  
24 hydrology with the re-evaluation of hydrology and  
25 generation of more accurate maps with new technology.

1           There was a determination -- there was a  
2 re-evaluation of the size needed for a sediment pond.  
3 The sediment pond was redesigned, submission was made to  
4 the Division to enlarge the sediment pond. It was  
5 reviewed by the Division and approved and the sediment  
6 pond was enlarged by Co-Op Mining Company.

7           During the enlargement the sediment material was  
8 taken from the pond, was placed in an area where it was  
9 to dry out before going to a final location. Once they  
10 had removed all the sediment, there was additional  
11 material taken from the bottom of the sediment pond to  
12 enlarge that sediment pond.

13 BY MR. KINGSTON:

14           Q.   That's additional material. Is that virgin  
15 material that was there originally?

16           A.   It was material which had not -- had  
17 previously been undisturbed.

18           Q.   Okay. Continue on.

19           A.   That material was taken upstream from the  
20 sediment pond and placed against an embankment, the  
21 outslope of what is called the shop pad and so that the  
22 moisture could run down back into the sediment pond. It  
23 was placed in an area where there would be no  
24 environmental -- no disturbance to additional area and  
25 that the material would be still within the disturbed

1 area.

2 Q. Within the plan that Co-Op Mining is operating  
3 under with the Division, does the plan describe what  
4 needs to be done with the sediment that's taken from the  
5 sediment pond?

6 A. Yes, it does.

7 Q. And that's -- does the plan provide for what  
8 you just described occurred with that sediment that was  
9 taken from this pond?

10 A. Yes, it does.

11 Q. Was the plan complied with in removing that  
12 sediment?

13 A. Yes, it was.

14 Q. Is there anything in the plan that deals with  
15 the virgin material that's taken from an area that's  
16 either being constructed as a pond or enlarged on an  
17 existing pond?

18 A. No, there is nothing there specifically that  
19 addresses that. An issue was never brought up during  
20 the review of the enlargement proposal.

21 Q. Is there any regulation that you're aware of,  
22 either the Division's regulation or a State statute,  
23 that deals with what has to be done with material that's  
24 taken from an area where a pond is either being  
25 constructed originally or enlarged?

1 A. Not specifically, no.

2 Q. How many ponds are in existence at the  
3 Bear Canyon operation and also the old Trail Canyon  
4 operation of Co-Op Mining Company?

5 A. There are two sediment ponds in the  
6 Bear Canyon operation and one at the Trail Canyon.

7 Q. Are you familiar with the manner of originally  
8 constructing those ponds?

9 A. I was not involved with the Co-Op Mining  
10 Company when those were constructed but they were done  
11 by large equipment and move -- and relocating original  
12 soil to grade the ponds.

13 Q. Have you had a chance to view each one of  
14 those ponds while you've been employed by Co-Op Mining  
15 Company?

16 A. Yes, I have.

17 Q. And you determined from your reviewing the  
18 situation what has been done with the material taken  
19 from the area made into the ponds?

20 A. Yes. Most of the material taken from the area  
21 where the pond is was used for the embankment of the  
22 pond or placed in an adjacent location.

23 MR. KINGSTON: I do have an exhibit that I would  
24 like to present to the Board that shows the area where  
25 the pond is that we're dealing with, as well as where

1 the material that was taken from the pond is being  
2 deposited. I believe I have enough copies for  
3 everybody, including Mr. Mitchell.

4 MR. MITCHELL: May I voir dire the witness with  
5 regard to this exhibit?

6 MR. CARTER: Yes.

7 FURTHER EXAMINATION

8 BY MR. MITCHELL:

9 Q. Mr. Mangum, does the exhibit which your  
10 counsel is passing out, was this ever used in any appeal  
11 of the N.O.V. for enlargement of a pad area without  
12 permit?

13 A. There is new -- there are new words on this  
14 page.

15 Q. Yes or no?

16 A. This information was available to the  
17 Division.

18 Q. The question is: Was this used in a hearing?

19 A. No, it was not.

20 Q. Thank you. Was this used for -- was any of  
21 the information used on here before the Board in an  
22 appeal of final assessment involving enlargement of a  
23 pad area without permit approval?

24 A. This information was available for the  
25 Division to --



1 Q. No. Answer my question.

2 A. When we did --

3 Q. Yes or no. Was this used in front of the  
4 Board in the formal hearing on appeal of a final N.O.V.  
5 in assessment for enlargement?

6 A. No, we have never met before this Board  
7 before.

8 Q. So this was never used as part of an appeal  
9 involving a fact of violation or penalty?

10 A. It was used. This --

11 Q. This document, I thought you said, had not  
12 been used?

13 A. This information was used.

14 Q. That's not my question. Was this document  
15 used?

16 A. No, this document was not.

17 Q. This is a new document which you prepared for  
18 this hearing; is that correct?

19 A. That is correct.

20 Q. Does this document in any way reflect the  
21 similarity between the enlarged sed -- or the enlarged  
22 shop pad area which was done without permit amendment or  
23 approval and the addition of a new road without approval  
24 or change to the permit?

25 A. Repeat your question again. It's not clear.

1 Q. Does this document in any way show similarity  
2 between the N.O.V. written for enlargement of a pad area  
3 without a permit and the N.O.V. written for placing a  
4 road without a permit?

5 A. There was no effort to try to show similarity  
6 between two N.O.V.'s with this document.

7 MR. MITCHELL: Thank you. I would move that it be  
8 struck as having no relevance to the two issues which  
9 are in front of this Board.

10 MR. CARTER: Let me let Mr. Kingston elicit some  
11 testimony as to the document and see where that takes  
12 us.

13 FURTHER EXAMINATION

14 BY MR. KINGSTON:

15 Q. Mr. Mangum, is this document a blowup or a  
16 part of a map that Co-Op Mining has prepared and  
17 submitted to the Division as part of the permit that  
18 they had?

19 A. Yes, it is.

20 Q. So this is something that the Division does  
21 have?

22 A. Yes, it is. This particular area happens to  
23 lie on a match line where two maps match and those maps  
24 are both 24 by 36, so this particular section of those  
25 two maps was taken from the two and put together to make

1 it easier to see the whole area that is being discussed  
2 on this particular violation.

3 Q. Does this map also show the precise location  
4 of the sediment ponds that we're dealing with in this  
5 violation, as well as the precise location of the pad  
6 where the material was deposited?

7 A. Yes, it does.

8 MR. KINGSTON: I move for the admission of this  
9 exhibit, Mr. Chairman.

10 MR. WILLIAMS: I object, your Honor.

11 MR. CARTER: Okay. I think we'll allow this  
12 exhibit to be admitted. It appears to be an excerpt of  
13 something that's already part of the record --

14 MR. MITCHELL: It's --

15 MR. CARTER: -- for the State.

16 MR. MITCHELL: It is something which was submitted  
17 in different form after the N.O.V.'s were written. It  
18 is not introduced as having any relevance to degree of  
19 negligence nor is it to the same -- or same or similar,  
20 therefore, I object because it's totally irrelevant,  
21 misleading and cannot lead to any evidence which will be  
22 relevant.

23 MR. CARTER: Let me ask one question of the  
24 witness. Does this accurately depict the areas that  
25 exist today?

1 THE WITNESS: Yes, it does.

2 MR. CARTER: I'm going to admit it over the  
3 objection of the State and we'll see what relevance it  
4 has for us, but it appears to me that it's offered to  
5 show the relationship between where the pond material  
6 was placed and where the pond is located, at least  
7 that's --

8 MR. MITCHELL: It's offered to show the state of  
9 affairs that existed after the N.O.V. was finalized and  
10 all the relevant time periods have passed.

11 MR. CARTER: Okay. Two different characterizations  
12 at the same time period which is now rather than then so  
13 --

14 MR. LAURISKI: Mr. Chairman, let me ask a question  
15 on following up on this document. And I may be jumping  
16 ahead on you, Mr. Kingston, but are you entering this  
17 document to show similarities between these violations,  
18 or are you entering this document to dispute the fact of  
19 the violations with respect to the two that are at issue  
20 here?

21 MR. KINGSTON: We're offering this primarily to  
22 dispute the issue of negligence, but I can't do that  
23 adequately unless I have my witnesses testifying  
24 regarding the conditions that existed where the material  
25 was taken, why it was taken, where it was taken.

1 MR. MITCHELL: My only point is that the map that  
2 depicted the state of affairs at the time the N.O.V. was  
3 issued and occurred would be relevant. A map that  
4 purports to show a period of time afterwards, I don't  
5 see what bearing that can have on it.

6 MR. CARTER: Let's take a five minute recess and  
7 I'll talk with counsel for both parties so that we can  
8 map out what we will and won't do in the next few  
9 minutes. And this is also for an administrative  
10 function we need to perform in relation to lunch so  
11 let's recess.

12 (Recess.)

13 MR. CARTER: In our agenda item number two, the  
14 Co-Op -- excuse me, agenda item number one, the Co-Op  
15 matter, after discussing the matter with counsel for  
16 both parties, it appears to the Chairman that there is  
17 an impasse here with regard to what the standard or the  
18 burden of proof is for the State in this matter and also  
19 with regard to what opportunities Co-Op has available to  
20 attack the negligence aspect of the N.O.V.'s which have  
21 been issued and which both parties agree are final and  
22 no longer appealable, so at this point what we'll do is  
23 to continue this matter.

24 We decided not to continue it until December  
25 because of conflicting schedules but we will continue

1 the matter, I'm hoping, to the January hearing, and in  
2 the interim I'm requesting that counsel for both parties  
3 submit briefing with regard to those issues; that is,  
4 what testimony is Co-Op entitled to put on to attack the  
5 N.O.V.'s or to attack the negligence aspects of the  
6 N.O.V.'s and with regard to the burden of proof of the  
7 State in terms of whether it needs to reprove the facts  
8 of the violation or the -- well, not the facts of the  
9 violation but the negligence associated with the  
10 N.O.V.'s.

11 So the order of the Board will be at this point to  
12 continue the matter. I'm going to leave it to counsel  
13 to agree upon a briefing schedule and I'm anticipating  
14 that at this point I've had expressions of interest from  
15 other Board members with regard to hearing the arguments  
16 and it may be that we will allow argument before the  
17 entire Board on those threshold issues before we proceed  
18 to whatever additional testimony would be allowed  
19 depending upon what the Board orders, but let me talk  
20 further with the Board about that.

21 So is there a general understanding? It was kind  
22 of long-winded, but I think we have a threshold issue  
23 that we need to resolve before we can proceed with our  
24 hearing.

25 MR. KINGSTON: It's my general understanding is

1 that I'll be talking to Mr. Mitchell and shoot for  
2 sometime towards the middle of December in which to have  
3 our briefs complete on those issues that you've outlined  
4 and then from that point on, I presume, I'll be meeting  
5 with the Board probably in January and maybe go to the  
6 issues that have been breached; is that correct?

7 MR. CARTER: I was originally anticipating that I  
8 would hear those legal arguments as hearing examiner for  
9 the Board and then make a recommendation and report to  
10 the Board. Let me defer that determination until I talk  
11 further. I think the Board may want to hear the  
12 arguments.

13 MR. KINGSTON: For right now my understanding is  
14 correct that the briefs will be due probably sometime  
15 around the middle of December at whatever time  
16 Mr. Mitchell and I can agree upon; is that correct?

17 MR. CARTER: I --

18 MR. MITCHELL: That's satisfactory. We would do  
19 that and then get a conference call with the Chairman  
20 and find out what the pleasure of the Board is in terms  
21 of hearing those arguments and timing and based on the  
22 Board's preference in that matter, we'll argue it in  
23 front of them at that time.

24 MR. LAURISKI: The only question I go back to again  
25 is on the focus of the briefs to which the chairman

1 argued that the focus would be on the negligence of the  
2 violations.

3 MR. CARTER: I think to try to state this as  
4 succinctly as I can, I think the focus of the briefs  
5 would be on whether or not Co-Op is entitled to present  
6 factual evidence which would tend to either mitigate the  
7 negligence or attack the negligence that was assessed  
8 under the N.O.V.'s. The motion to dismiss that Co-Op  
9 made was based upon their argument that under the  
10 statute the State is required to separately show  
11 negligence in order to be entitled to the relief it  
12 seeks and the Board finding a pattern of violations.

13 The State's position has been that once negligence  
14 has been assessed and is not appealed, that the issue of  
15 negligence has been put to rest and that any further  
16 testimony on negligence would be improper.

17 MR. MITCHELL: Just as way of clarification, for  
18 example, if you had two N.O.V.'s in the range of zero to  
19 X and they were all down there around zero, one, two or  
20 three, it would certainly be appropriate to argue that  
21 negligence down near the zero range doesn't constitute  
22 wilful, so forth and so forth, and throughout that range  
23 that argument can be made whether it constitutes  
24 wilfulness or unwarranted.

25 Our objection has been -- I think our focus is



1 whether there can be a factual collateral attack upon a  
2 prior res judicata finding of negligence of a certain  
3 degree or level within that range.

4 MR. CARTER: Well, and I think perhaps the briefing  
5 should also address what level of negligence -- I mean,  
6 how you verbalize a point assignment of negligence.

7 MR. MITCHELL: Right. And that, I think, can save  
8 time because that would -- that, in any case, would be  
9 part of the argument to the Board and that might be  
10 worthwhile to have argued in brief formative answers.

11 MR. CARTER: All right. So we will try not to  
12 unduly prolong this, but I think it's important, as this  
13 is our first opportunity to make a ruling on these kinds  
14 of issues, to do it correctly.

15 MS. LEVER: And you would recommend that we come  
16 back, the Board, for all of our edification so we're all  
17 informed of the decision that comes down?

18 MR. CARTER: I'll take that as an expression of  
19 interest and let's plan on hearing argument in this  
20 matter at the Board's hearing room in January. All  
21 right, thank you all.

22 I need to apologize to Mr. Pruitt. I improvidently  
23 guessed that we would be finished in time for him to  
24 have his matter heard before lunch and it appears that  
25 we won't. We have a commitment at noon so we'll take

1 our lunch recess and we'll reconvene at  
2 1 o'clock. We're staying on the premises so we'll hold  
3 it to an hour so we can start again at 1:00. Thank you  
4 very much.

5 (Recess.)  
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1  
2  
3 STATE OF UTAH )  
4 ) ss.  
5 COUNTY OF SALT LAKE )

6 I, DANA MARIE MORSE, a Certified Shorthand Reporter,  
7 Registered Professional Reporter, and Notary Public for  
8 the State of Utah, residing in Utah, certify:

9 That the hearing above was taken before me pursuant to  
10 notice at the time and place therein set forth, at which  
11 time the witnesses were by me duly sworn to testify the  
12 truth.

13 That the testimony of the witnesses and all objections  
14 made and all proceedings had at the time of the  
15 examinations were recorded stenographically by me and  
16 were thereafter transcribed, and I hereby certify that  
17 the foregoing transcript is a full, true, and correct  
18 record of my stenographic notes so taken;

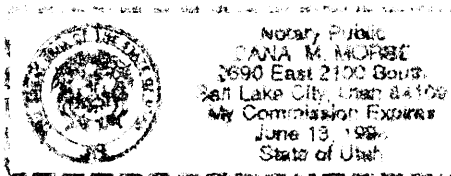
19 I further certify that I am neither counsel for or  
20 related to any party to said action in anywise  
21 interested in the outcome thereof.

22 IN WITNESS WHEREOF, I have hereunto subscribed my hand  
23 and affixed my official seal this 28th day of October,  
24 1992.

25   
DANA MARIE MORSE

Certified Shorthand Reporter,  
Registered Professional Reporter,  
and Notary Public in and for the  
County of Salt Lake, State of Utah.

My Commission Expires:  
June 13, 1994



0/27/92

POSSIBLE PATTERN OF VIOLATIONS FOR  
ACT-015-025  
12/01/90 - 01/01/92

page 1

ASSESSMENT	NOV/CO#		ISSUED DATE		VIOLATION TYPE
Final	NOV N91-35-1-1	1/1	02/27/91	L	Other
Final	NOV N91-26-4-3	3/3	04/19/91	L	Other
Final	NOV N91-20-1-1	1/1	04/26/91	L	Other
Final	NOV N91-34-2-1	1/1	05/20/91	L	Other
Final	NOV N91-26-7-2	1/2	07/02/91	L	Other
Final	NOV N91-26-7-2	2/2	07/02/91	L	Other
Final	NOV N91-40-1-1	1/1	11/15/91	L	Other
Final	NOV N91-35-8-1	1/1	12/04/91	L	Other
Final	NOV N91-40-2-2	2/2	12/19/91	L	Other

*Division's***EXHIBIT**

#1

extension, the permittee may request a further extension in accordance with the procedures of R645-400-328.200.

329. Enforcement actions at abandoned sites. The Division may refrain from using a notice of violation or cessation order for a violation at an abandoned site, as defined in R645-100-200., if abatement of the violation is required under any previously issued notice on order.

330. Suspension or Revocation of Permits.

331. The Board will issue an order to a permittee requiring him or her to show cause why his or her permit and right to mine under the State Program should not be suspended or revoked, if the Board determines that a pattern of violations of any requirements of the State Program, or any permit condition required by the Act exists or has existed, and that each violation was caused by the permittee willfully or through an unwarranted failure to comply with those requirements or conditions. A finding of unwarranted failure to comply will be based upon a demonstration of greater than ordinary negligence on the part of the permittee. Violations by any person conducting coal mining and reclamation operations on behalf of the permittee will be attributed to the permittee, unless the permittee establishes that they were acts of deliberate sabotage.

332. Pattern of Violation.

332.100. The Director may determine that a pattern of violations exists or has existed, based upon two or more Division inspections of the permit area within a 12-month period, after considering the circumstances, including:

332.110. The number of violations, cited on more than one occasion, of the same or related requirements of the State Program or the permit; and

332.120. The number of violations, cited on more than one occasion, of different requirements of the State Program or the permit; and

332.130. The extent to which the violations were isolated departures from lawful conduct.

332.200. If after the review described in R645-400-332, the Director determines that a pattern of violation exists or has existed and that each violation was caused by the permittee willfully or through unwarranted failure to comply, he or she will recommend that the Board issue an order to show cause as provided in R645-400-331.

332.300. The Director will promptly review the history of violations of any permittee who has been cited for violations of the same or related requirements of the State Program, or the permit during three or more state inspections of the permit area within a 12-month period. If, after such review, the Director determines that a pattern of violations exists or has existed, he or she will recommend that the Board issue an order to show cause as provided in paragraph R645-400-331.

333. Number of Violations.

333.100. In determining the number of violations within a 12-month period, the Director will consider only violations issued as a result of a state inspection carried out during enforcement of the State Program.

333.200. The Director may not consider violations issued as a result of inspections other than those mentioned in R645-400-333.100 in determining whether to exercise his or her discretion under R645-400-332.100, except as evidence of the willful or unwarranted nature of the permittee's failure to comply.

334. Whenever a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as subsequently extended, the Director will review the permittee's history of violations to determine whether a pattern of violations caused by the permittee's willful or unwarranted failure to comply exists pursuant to this section, and will make a recommendation to the Board concerning whether or not an order to show cause should issue pursuant to R645-400-331.

335. Hearing Procedures.

335.100. If the permittee files an answer to the show cause order and requests a hearing, a formal public hearing on the record will be conducted pursuant to the R641 Rules before the Board or at the Board's option by an administrative hearing officer. The hearing officer will be a person who meets minimum requirements for a hearing officer under Utah law. At such hearing the Division will have the burden of establishing a prima facie case for suspension or revocation of the permit based upon clear and convincing evidence. The ultimate burden of persuasion that the permit should not be suspended or revoked will rest with the permittee.

The Board or Officer will give 30 days written notice of the date, time and place of the hearing to the Director, the permittee and any intervenor. Upon receipt of the notice the Director will publish it, if practicable, in a newspaper of general circulation in the area of the coal mining and reclamation operations, and will post it at the Division office closest to those operations. Upon written request by the permittee, such hearing may at the Board's option be held at or near the mine site within the county in which the permittee's operations are located.

335.200. Within 60 days after the hearing, the Board will prepare a written determination, or the Officer will prepare a written determination to the Board, as to whether or not a pattern of violation exists. If the determination is prepared by the hearing officer, it will be reviewed by the Board which will make the final decision thereon. If the Board finds a pattern of violations and revokes or suspends the permit and the permittee's right to mine under the State Program, the permittee will immediately cease coal mining operations on the permit area and will:

335.210. If the permit and the right to mine under the State Program are revoked, complete reclamation within the time specified in the order; or

335.220. If the permit and the right to mine under the State Program are suspended, complete all affirmative obligations to abate all conditions, practices, or violations as specified in the order.

340. Service of Notices of Violation, Cessation Orders and Show Cause Orders.

341. A notice of violation or cessation order will be served on the permittee or his designated agent promptly after issuance, as follows:

(6) Any person who is injured in his person or property through the violation by an operator of any rule, order, or permit issued pursuant to this chapter may bring an action for damages, including reasonable attorney and expert witness fees, only in the judicial district in which the surface coal mining operation complained of is located. Nothing in this subsection shall affect the rights established by or limits imposed under Utah workmen's compensation laws.

1985

40-10-22. Violation of chapter or permit conditions - Inspection - Cessation order, abatement notice, or show cause order - Suspension or revocation of permit - Review - Costs assessed against either party.

(1)(a) Whenever, on the basis of any information available, including receipt of information from any person, the division has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the division shall immediately order inspection of the surface coal mining operation at which the alleged violation is occurring, unless the information available to the division is a result of a previous inspection of the surface coal mining operation. When the inspection results from information provided to the division by any person, the division shall notify that person when the inspection is proposed to be carried out, and that person shall be allowed to accompany the inspector during the inspection.

(b) When, on the basis of any inspection, the division determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the division shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. The cessation order shall remain in effect until the division determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the division pursuant to subsection (1)(e). Where the division finds that the ordered cessation of surface coal mining and reclamation operations, or any portion of same, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the division shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the division deems necessary to abate the imminent danger or the significant environmental harm.

(c) When, on the basis of an inspection, the division determines that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter, but the violation does not create an imminent danger to the health or safety of the public or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the division shall issue a notice to the permittee or his agent fixing a reasonable time but not more than 90 days for the abatement of the violation and providing opportunity for conference before the division. If upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown, and upon the written finding of the division, the division finds that the violation has not been abated, it shall immediately order a cessation of surface coal mining and reclamation operations or the portion of same relevant to the violation. The cessation order shall remain in effect until the division determines that the violation has been abated or until modified, vacated, or terminated by the division pursuant to subsection (1)(e). In the order of cessation issued by the division under this subsection (1)(c), the division shall determine the steps necessary to abate the violation in the most expeditious manner possible and shall include the necessary measures in the order.

(d) When on the basis of an inspection the division determines that a pattern of violations of any requirements of this chapter or any permit conditions required by this chapter exists or has existed, and if the division also finds that these violations are caused by the unwarranted failure of the permittee to comply with any requirements of this chapter or any permit conditions or that these violations are willfully caused by the permittee, the board shall be requested to issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a conference is requested, the division shall inform all interested parties of the time and place of the hearing. Upon the permittee's failure to show cause as to why the permit should not be suspended or revoked, the board shall immediately suspend or revoke the permit.

(e) Notices and orders issued under this section shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the permittee or his agent by the division, and the notices and orders shall be in writing and shall be signed by the director, or his authorized representative who issues such notice or order. Any notice or order issued under this section may be modified, vacated, or terminated by the division, but any notice or order issued under this section which requires cessation of mining by the operator shall expire within 30 days of actual notice to the operator unless a conference is held before the division.

(2)(a) The division may request the attorney general to institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court for the district in which the surface coal mining and reclamation operation is located or in which the permittee of the operation has his principal office, whenever such permittee or his agent:

(i) Violates or fails or refuses to comply with any order or decision issued by the division under this chapter;

(ii) Interferes with, hinders, or delays the division or its authorized representatives in carrying out the provisions of this chapter;

(iii) Refuses to admit the authorized representatives to the mine;

(iv) Refuses to permit inspection of the mine by the authorized representative;

(v) Refuses to furnish any information or report requested by the division in furtherance of the provisions of this chapter; or

(vi) Refuses to permit access to and copying of such records as the division determines necessary in the carrying out the provisions of this chapter.

(b) The court shall have jurisdiction to provide such relief as may be appropriate. Any relief granted by the court to enforce an order under subsection (2)(a)(i) shall continue in effect until the completion or final termination of all proceedings for review of that order under this chapter, unless, prior to this completion or termination, the district court granting the relief sets it aside or modifies it.

(3)(a) A permittee issued a notice or order by the division pursuant to the provisions of subsections (1)(b) and (1)(c), or any person having an interest which may be adversely affected by the notice or order, may apply to the board for review of the notice or order within 30 days of receipt of it or within 30 days of its modification, vacation, or termination. Upon receipt of this application, the board shall cause such investigation to be



UTAH  
NATURAL RESOURCES  
Oil, Gas & Mining

3 Triad Center • Suite 350 • Salt Lake City, UT 84180-1203 • 801-538-5340

Page 1 of 2

NO. N90-35-01-01

To the following Permittee or Operator:

Name Co-Op Mining Co.  
 Mine Bear Canyon ☐ Surface ☒ Underground ☐ Other  
 County Emery State UT Telephone (801) 381-2450  
 Mailing Address P.O. Box 1245 Huntington, UT 84528  
 State Permit No. ACT 015/025  
 Ownership Category ☐ State ☐ Federal ☒ Fee ☐ Mixed  
 Date of inspection 2/22/91, 19\_\_\_\_  
 Time of inspection 11:30 ☒ a.m. ☐ p.m. to 1:30 ☐ a.m. ☒ p.m.  
 Operator Name (other than Permittee) \_\_\_\_\_  
 Mailing Address \_\_\_\_\_

Under authority of the Utah Coal Mining and Reclamation Act, Section 40-10-1 et seq., *Utah Code Annotated*, 1953, the undersigned authorized representative of the Division of Oil, Gas & Mining has conducted an inspection of above mine on above date and has found violation(s) of the act, regulations or required permit condition(s) listed in attachment(s). This notice constitutes a separate Notice of Violation for each violation listed.

You must abate each of these violations within the designated abatement time. You are responsible for doing all work in a safe and workmanlike manner.

The undersigned representative finds that **cessation of mining is** ☐ **is not** ☒ expressly or in practical effect required by this notice. For this purpose, "mining" means extracting coal from the earth or a waste pile, and transporting it within or from the mine site.

This notice shall remain in effect until it expires as provided on reverse side of this form, or is modified, terminated or vacated by written notice of an authorized representative of the director of the Division of Oil, Gas & Mining. Time for abatement may be extended by authorized representative for good cause, if a request is made within a reasonable time before the end of abatement period.

Date of service/mailling 2/27/91 Time of service/mailling 10:00 ☒ a.m. ☐ p.m.

Mr. Wendell Owen  
 Permittee/Operator representative

Mine Manager  
 Title

Signature

Susan M. White  
 Division of Oil, Gas & Mining representative

Reclamation Specialist  
 Title

Susan M. White  
 Signature

35  
 Identification Number

SEE REVERSE SIDE

WHITE-DOGM YELLOW-OSM PINK-PERMITTEE/OPERATOR GOLDENROD-NOV FILE

DOGM/NOV-1

Certified P074979 D12 an equal opportunity employee

EXHIBIT

11/85

2/27/91

#2

notice of violation

NOTICE OF VIOLATION NO. N 91-35-01-01

Violation No. 1 of 1

Nature of violation

Failure to conduct mining and reclamation activities in accordance with the approved plan.  
Failure to include a detailed description of each road constructed, used or maintained within the permit area.  
Failure to remove topsoil from the area to be disturbed.

Provisions of act, regulations or permit violated

R614-301-534.100 thru R614-301-534.130

R614-301-527.100

R614-301-527.200 thru 527.210, 527.230, 527.240

~~R614~~ R614-301-232.100

UCA 40-10-18(j)

Portion of operation to which notice applies

A road was bladed from the top of upper road (near upper pad) to coal shoot where a hoist was installed.

Remedial action required (including any interim steps)

Provide to the Division a plan which is suitable for insertion into the permit, construction and design criteria in accordance w/ R614-301-534 and R614-301-527, a reclamation plan, and increase in bond estimate for reclamation. The road must also be located on facility maps. All disturbance associated with the road must be seeded.

Abatement time (including interim steps)

Permit and map revisions suitable for inclusion in the permit must be submitted by April 1, <sup>1991</sup> 5:00 pm. Disturbed area must be seeded with a temporary seed (Barley or oats) by April 1, 1991. Fall 1991 the area must be seeded with the interim seed mixture.

WHITE-DOG M YELLOW-OS M PINK-PERMITTEE/OPERATOR GOLDENROD-NOV FILE





# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangerter  
Governor

Dee C. Hansen  
Executive Director

Dianne R. Nielson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

April 30, 1991

Certified Return Receipt  
P 074 979 067

Mr. Wendell Owen  
Co-Op Mining Company  
P.O. Box 1245  
Huntington, Utah 84528

Dear Mr. Owen:

Re: Hindrance Violation NOV #N91-20-1-1, Co-Op Mining Company,  
Bear Canyon Mine, ACT/015/025, Folder #2 and #5 Emery  
County, Utah

Attached is a hindrance violation for failure to respond to the Division Order issued November 27, 1990, in a complete and technically adequate manner. Please note the abatement date of May 24, 1991. Due to the time already consumed in the Division Order, no extensions will be allowed beyond this abatement date.

Sincerely,

Lowell P. Braxton  
Associate Director, Mining

jbe  
Attachment

cc: Carl Kingston, Co-Op  
Eldon Kingston, Co-Op  
J. Helfrich, DOGM  
P. Grubaugh-Littig, DOGM  
T. Munson, DOGM

AT015025.7



UTAH  
NATURAL RESOURCES  
Oil, Gas & Mining

3 Triad Center • Suite 350 • Salt Lake City, UT 84180-1203 • 801-538-5340

Certified Receipt  
P 074 979 067

Page 1 of 2

NO. N 91-20-1-1

To the following Permittee or Operator:

Name CO-OP MINING COMPANY

Mine BEAR CANYON MINE ☐ Surface ☒ Underground ☐ Other

County EMERY State UTAH Telephone \_\_\_\_\_

Mailing Address P.O. BOX 1245 HUNTINGTON, UTAH 84528

State Permit No. ACT/015/025

Ownership Category ☐ State ☐ Federal ☒ Fee ☐ Mixed

Date of inspection \_\_\_\_\_, 19 \_\_\_\_\_

Time of inspection \_\_\_\_\_ ☐ a.m. ☐ p.m. to \_\_\_\_\_ ☐ a.m. ☐ p.m.

Operator Name (other than Permittee) \_\_\_\_\_

Mailing Address \_\_\_\_\_

Under authority of the Utah Coal Mining and Reclamation Act, Section 40-10-1 et seq., *Utah Code Annotated*, 1953, the undersigned authorized representative of the Division of Oil, Gas & Mining has conducted an inspection of above mine on above date and has found violation(s) of the act, regulations or required permit condition(s) listed in attachment(s). This notice constitutes a separate Notice of Violation for each violation listed.

You must abate each of these violations within the designated abatement time. You are responsible for doing all work in a safe and workmanlike manner.

The undersigned representative finds that cessation of mining is ☐ is not ☒ expressly or in practical effect required by this notice. For this purpose, "mining" means extracting coal from the earth or a waste pile, and transporting it within or from the mine site.

This notice shall remain in effect until it expires as provided on reverse side of this form, or is modified, terminated or vacated by written notice of an authorized representative of the director of the Division of Oil, Gas & Mining. Time for abatement may be extended by authorized representative for good cause, if a request is made within a reasonable time before the end of abatement period.

Date of service/mailling April 26, 1991

Time of service (mailling) 5-2-91 3:00 ☐ a.m. ☒ p.m.

WENDELL OWEN  
Permittee/Operator representative

MINE MANAGER  
Title

Signature \_\_\_\_\_

PAMELA GAUBAUGH-LITTLE  
Division of Oil, Gas & Mining representative

Permit Supervisor LPB  
Title

[Signature]  
Signature

#20  
Identification Number

SEE REVERSE SIDE

WHITE-DOGM YELLOW-OSM PINK-PERMITTEE/OPERATOR GOLDENROD-NOV FILE

notice of violation



NOTICE OF VIOLATION NO. N 91-20-1-1

Violation No. 1 of 1

Nature of violation

*Failure to operate in accordance and compliance with the terms and conditions of the permit, all applicable performance standards and requirements of the State Program. Failure to submit all information required by the Division Order issued 11/27/90 (i.e. items identified as #8, #14, #17, and #18) ~~have not been~~*

Provisions of act, regulations or permit violated

*UAC R614-300-143*

*UAC R614-303-212*

Portion of operation to which notice applies

*The entire permit area*

Remedial action required (including any interim steps)

*Submit all complete and technically adequate information (as determined by the Division) to comply with all Division regulations and the Division Order issued 11/27/90*

Abatement time (including interim steps)

*May 24, 1991 (with no extensions beyond that date).*

*LPB*



NO. N 91-26-7-2

To the following Permittee or Operator:

Name Co-Op. Mining Co.

Mine Bear Canyon

☐ Surface

☒ Underground

☐ Other

County Emery

State Ut

Telephone \_\_\_\_\_

Mailing Address P.O. Box 1245, Huntington, Ut 84528

State Permit No. ACT/015/025

Ownership Category

☐ State

☐ Federal

☒ Fee

☐ Mixed

Date of inspection July 1, 1991

Time of inspection 7/1/91  
7/2/91

☒ a.m.

☐ p.m. to

4

☐ a.m.

☒ p.m.

Operator Name (other than Permittee) Wendell Owen

12 noon.

Mailing Address Same As Above

Under authority of the Utah Coal Mining and Reclamation Act, Section 40-10-1 et seq., *Utah Code Annotated*, 1953, the undersigned authorized representative of the Division of Oil, Gas & Mining has conducted an inspection of above mine on above date and has found violation(s) of the act, regulations or required permit condition(s) listed in attachment(s). This notice constitutes a separate Notice of Violation for each violation listed.

You must abate each of these violations within the designated abatement time. You are responsible for doing all work in a safe and workmanlike manner.

The undersigned representative finds that cessation of mining is ☐ is not ☒ expressly or in practical effect required by this notice. For this purpose, "mining" means extracting coal from the earth or a waste pile, and transporting it within or from the mine site.

This notice shall remain in effect until it expires as provided on reverse side of this form, or is modified, terminated or vacated by written notice of an authorized representative of the director of the Division of Oil, Gas & Mining. Time for abatement may be extended by authorized representative for good cause, if a request is made within a reasonable time before the end of abatement period.

Date of service/mailling 7/2/91

Time of service/mailling 11 ☒ a.m. ☐ p.m.

Wendell Owen

Permittee/Operator representative

Mine Mgr.

Title

By: Gayle Atwood

Signature

Wm. J. Malencik

Division of Oil, Gas & Mining representative

Rec. Spec.

Title

Wm. J. Malencik

Signature

#26

Identification Number

SEE REVERSE SIDE

WHITE-DOGM YELLOW-OSM PINK-PERMITTEE/OPERATOR GOLDENROD-NOV FILE



NOTICE OF VIOLATION NO. N 91-26-7-2

Violation No. 1 of 2

Nature of violation

- (a) Failure to design, construct and/or maintain primary road drainage controls
- (b) Failure to maintain surface drainage control at the bottom of the Hoist Road i.e., beltline coal was stored in the drainage control

Provisions of act, regulations or permit violated

- (a) R614-301-742.423.1, R614-301-742.423.3
- (b) R614-301-742.411

Portion of operation to which notice applies

- (a) Primary Road from the permit boundary gate to the coal loadout area.
- (b) Hoist Road

Remedial action required (including any interim steps)

- (a) 1. Submit plans on the primary road drainage system.
- (a) 2. Regrade and/or reestablish road drainage on primary road from gate to sediment pond B inlet, road crossing above the coal loadout area.
- (b) Clean coal from Hoist Road drainage system.

Abatement time (including interim steps)

- (a) 1. August 1, 1991 - 5 p.m.
- (a) 2 & (b) July 9, 1991 - 5 p.m.



## NOTICE OF VIOLATION NO. N 91-26-7-2

Violation No. 2 of 2

Nature of violation

Failure to obtain Division approval before enlarging the shop pad.

Provisions of act, regulations or permit violated

R614-300-143

Portion of operation to which notice applies

Shop pad that lies within the disturbed portions of the permit area.

Remedial action required (including any interim steps)

- (1) Submit plan for enlarging the shop pad\*
- (2) Test fill material for toxicity as required by the Division
- (3) Test fill material for compaction as required by the Division

\* Plan should include slope stability, drainage control off the pad & outslope, and seeding the outslope

Abatement time (including interim steps)

August 1, 1991, 5p.m.



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangarter  
Governor

Dee C. Hansen  
Executive Director

Dianne R. Nielson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

August 20, 1991

Wendell Owen  
Co-Op Mining Company  
P. O. Box 1245  
Huntington, UT 84528

Dear Mr. Owen:

Re: Potential Pattern of Violations, Co-Op Mining Company, Bear Canyon Mine, ACT/015/025, Folder #5, Emery County, Utah.

The purpose of this letter is to inform you that Co-Op Mining Company has a potential pattern of violations regarding its operations at the Bear Canyon Mine. The potential pattern is based on the following violations:

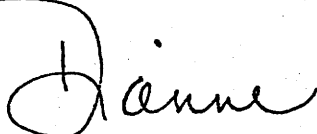
C90-26-1-1  
N90-34-1-1  
N91-35-1-1  
N91-20-1-1  
N91-26-7-2, 2/2

The Division will not proceed to further evaluate this potential pattern until any appeals of violations N91-20-1-1 and N91-26-7-2, 2/2, have been completed and finalized. However, the seriousness of this situation merits your attention. If the Division determines that such a pattern exists, you will be notified and the matter will go before the Board of Oil, Gas and Mining. A finding by the Board of a pattern of violations due to willful and unwarranted failure to comply, as delineated in Utah Admin. R614-400-330 through 335 is cause for suspension or revocation of Co-Op's permit.

Page 2  
Wendell Owen  
August 20, 1991

Please contact Lowell Braxton or me if you have any questions. The Division is available to discuss operations at the mine, but compliance with the program requires an ongoing commitment by Co-Op and its staff.

Best regards,

A handwritten signature in cursive script, appearing to read "Dianne".

Dianne R. Nielson  
Director

cc: R. Hagen  
L. Braxton  
P. Grubaugh-Littig  
J. Helfrich



*Joe Helfrich*

*Aug 9 mine file*  
*12/14/91*  
*RR*  
*BR*  
*PG*  
*Grubbs-Litig*

# C.W. MINING COMPANY

P.O. Box 300  
Huntington, Utah 84528



(801) 381-5238  
Coal Sales (801) 381-5777

4 December 1991

Dianne R. Nielson  
Director  
Utah Division of Oil Gas & Mining  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203

RECEIVED

DEC 06 1991

Dear Ms. Nielson,

DIVISION OF  
OIL GAS & MINING

Re: Compliance Program, Co-Op Mining Company, Bear Canyon Mine,  
ACT/015/025, Emery County, Utah

The purpose of this correspondence is to discuss the Division letter dated August 20, 1991 involving a Potential Pattern of Violations. Co-Op Mining Company is extremely concerned about this issue and wishes to convey information that may impact the impression exhibited by the Division in the letter.

As the Division is aware Co-Op has increased it's efforts significantly during the last year to meet all compliance issues including the following:

- o Mr. Gaylon Atwood was assigned the task of coordinating on-site inspections with the Division and to ensure compliance with the approved mine plan in March, 1991.
- o Additional personnel (Mr. Marlow Peterson, Oct 1991) were assigned to conduct routine maintenance activities and to implement approved modifications to surface structures.
- o Mangum Engineering Consultants (M.E.C.) was contracted to regenerate maps the end of 1990 and to increase on-site coordination.
- o M.E.C. was contracted starting 1 Sept 1991 to implement an improved on-site permit compliance program. Charles Reynolds has been available to coordinate all on-site inspections by the Division and to direct compliance activities.
- o M.E.C. contracted to conduct on-site water monitoring activities starting Nov. 1991.

*Division's*  
**EXHIBIT**

#6

Page 2

DOGM

4 December 1991

Although the violations listed in the referenced Division letter may indicate a need for better coordination they do not exhibit a pattern of willfully or unwarranted failure to comply with the requirements and conditions of the State of Utah - R614 Coal Mining Rules. The five violations cited in the referenced letter are discussed on the attached pages.

The recent improvements implemented by Co-Op have been made as a conscious effort to meet all regulatory requirements. I am aware that Division personnel have expressed their appreciation for the improvements made (See Division letter dated 29 October 1991) and I am sure that the improved pattern will continue in a positive direction. Please contact me if I can assist you with any manner.

Thank you,

A handwritten signature in cursive script, appearing to read "Wendell Owen".

Wendell Owen,  
Resident Agent

cc: COP Coal Development Co.  
enclosure(s).

4 December 1991

C90-26-1-1. "Conducting coal mining and reclamation without a valid coal mining permit."

The required notice for public comment was published in October 1990. This notice included both the application request for addition of the federal leases and the Permit Renewal. The notice was given to the Division in July 1990 for review and no comments were received. Following initial publication the Division notified Co-Op that the notice must be republished with the federal lease additions and Permit Renewal issues separated. This hold up resulted in public hearings being delayed. The requirement for new base maps also had a major impact on this matter.

N90-34-1-1. "The maps and cross sections in the mine plan are inaccurate and do not reflect the actual operation as conducted on the ground. ..."

This issue was determined during the final stages of the Permit Renewal process. Co-Op Mining Company contracted with reputable consultants (Horrocks and Corollo Eng., American Fork, Utah and Black Hawk Eng., Helper, Utah) to generate the maps that were used to obtain the original permit and in the approved permit in 1990. These maps had been updated as required and had gone through numerous reviews by the Division. Upon review of the concerns as to the accuracy of these maps and cross sections, Co-Op initiated procedures to generate new maps using aerial photography and computer generated data. Olympus Aerial Surveys Inc., Salt Lake City, Utah, was contracted to generate new base map data prior to the issuance of the referenced violation.

N91-35-1-1. Installation of "Hoist Road" without prior approval.

Better coordination with consultants would have precluded this violation. The hoist road was constructed during installation of dust control structures. The road is within the disturbed area boundaries.

N91-20-1-1. Hindrance violation. "Failure to submit all information required by the Division Order issued 11/27/90, (i.e. items identified as #8, #14, #17 and #18).

This violation is currently under review. Communication concerning the incomplete issues was maintained continuously during the upgrading of the mine plan and it is felt that issuance of the violation was not merited due to the nature of the work required.

Page 4

DOGM

4 December 1991

N91-26-7-2,, "Failure to obtain Division approval before enlarging the shop pad."

The shop pad was enlarged due to placement of material generated during work on Sediment Pond "A" at the outslope of the shop pad. The work being conducted on Sediment Pond "A" was approved by the Division. Equipment operators were not properly following instructions given them by management when they placed the material in this location. Upon review of the situation the Division was notified of the situation and a request for change to the plan was made by M.E.C. prior to issuance of the violation. See M.E.C. letter dated 24 June 1991.



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangerter  
Governor

Dee C. Hansen  
Executive Director

Dianne R. Nielson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

February 25, 1992

TO: Dianne R. Nielson, Director

FROM: Lowell P. Braxton, Associate Director, Mining *LAB*

RE: Pattern of Violations Determination, Co-Op Mining Company, Bear Canyon Mine, ACT/015/025, Emery County, Utah

Attached please find a copy of the Division's Pattern of Violations (POV) procedure. A POV review conducted in January, 1992 substantiates three same or similar violations for Bear Canyon within a 12-month period, all three of the violations having been upheld.

Section 5b of the POV policy requires the Associate Director to provide written recommendation to the Director regarding unwarranted or willful failure to comply. Attached please find Joseph C. Helfrich's July 25, 1991, memo substantiating 20 or more points of greater degree of fault having been awarded to each of the following violations: N91-35-1-1, N91-20-1-1, N91-26-7-2 (2 of 2). This assessment of degree of fault was not changed on any of the violations upon finalization. (The last, N91-20-1-1 having been finalized January 20, 1992.)

This degree of fault should be considered in determining if there has been an unwarranted or willful failure to comply. Per Section 5c of the POV procedure, a review of this potential pattern by an Assistant Attorney General is requested.

Please advise if additional information is required.

vb  
Attachments  
cc: J. Helfrich  
pov

*Division's*  
**EXHIBIT**

#7



STATE OF UTAH  
NATURAL RESOURCES  
Oil, Gas & Mining

Norman H. Bangerter, Governor  
Dee C. Hansen, Executive Director  
Dianne R. Nielson, Ph.D., Division Director

355 W. North Temple • 3 Triad Center • Suite 350 • Salt Lake City, UT 84180-1203 • 801-538-5340

May 1, 1986

TO: Mining Staff  
FROM: Dianne R. Nielson, Director *DRN*  
RE: Procedure for Determination of Pattern of Violations

The following procedure will be followed to review listings of violations, identify potential patterns, and make determinations concerning patterns of violations.

1. Tracking System Data Entry

Office specialist for coal-field inspection data will enter and update data from field inspections on a regular basis for the NOV/CO tracking system. Data entry will include:

- NOV #
- type of violation
- date issued
- inspector
- status of the assessment (proposed, final)
- level of appeal

2. Review of Tracking System Printout

- a. Compliance Coordinator and Associate Director will establish a list of similar violations for pattern-review purposes.
- b. Compliance Coordinator will review the PATTERN tracking system on a monthly basis and note all operations with three-or-more same or similar violations during the previous 12-month period, based on the date the violation was issued. At this point, it is recognized that some of the violations may not have been finalized through the assessment process.
- c. After meeting with the Field Specialist and Permit Supervisor responsible for the subject mining operation, the Compliance Coordinator will prepare a

Page 2

Memorandum - Mining Staff  
Pattern of Violations Procedure  
May 1, 1986

memorandum entitled Tracking System Review for the Month of \_\_\_\_\_, 19\_\_\_\_, to the Associate Director, summarizing his findings. The memorandum will include:

- operator
- listing of same or similar violations
- nature of the violations
- issue dates
- dates finalized or status of appeals process

3. Initial Determination of Three-or-More Violations

- a. Compliance Coordinator and Associate Director will meet on a monthly basis, if necessary, to review listings on the memorandum. Associate Director, with assistance of Compliance Coordinator, will determine if the information supports a determination of "three same or similar violations within a 12-month period."
- b. The determination will be based on issuance date, not finalized assessment date. If the violation is later vacated, it will not be considered in the listing.
- c. Associate Director will prepare a memorandum entitled Operators with Three-or-More Same or Similar Violations During a 12-Month Period to the file, summarizing their determinations, with copies to:
  - OSM Albuquerque Field Office
  - DOGM Director
  - Compliance Coordinator

4. Finalized Assessments

No further action will be taken concerning a review of the pattern status until all subject violations have been finalized, either through notification to the operator with no response within 30 days, or through the assessment conference or Board hearing.

5. Recommendation on "Unwarranted or Willful Failure to Comply"

- a. If subject violations are sustained through the final assessment such that a potential pattern still exists,

the Associate Director and the Compliance Coordinator will review each violation regarding "unwarranted or willful failure to comply."

- b. Associate Director will prepare a memorandum entitled Review of Violations for Unwarranted or Willful Failure to Comply, to the Director, indicating whether or not each violation is deemed to represent an unwarranted or willful failure to comply and, hence, whether a potential pattern of violations is deemed to exist.
- c. The Director will request that the Assistant Attorney General review the memorandum and provide comments to the Director.
- d. If the Director concurs with or determines, based on this memorandum, the Assistant Attorney General's comments, and the supporting data, that a potential pattern does not exist, the Director will finalize the review with a cover memorandum to the file with supporting material attached. This memorandum will be copied to the:

- OSM Albuquerque Field Office
- Associate Director
- Compliance Coordinator

6. Notification of Potential Pattern Informal Conference

- a. If the Director concurs with or determines, based on the Associate Director's memorandum, the Assistant Attorney General's comments, and the supporting data, that a potential pattern does exist, the Director will prepare a memorandum summarizing this, with attached, supporting material. The memorandum to file will be copied to:

- OSM Albuquerque Field Office
- Associate Director
- Assistant Attorney General
- Compliance Coordinator

- b. The operator will be notified by letter that he has incurred three-or-more violations during a 12-month period and that the potential exists for a pattern of violations. The operator will be given an opportunity



Page 4

Memorandum - Mining Staff  
Pattern of Violations Procedure  
May 1, 1986

to request, within 30 days, an informal conference with the Division to discuss the "unwarranted or willful failure to comply" nature of the violations. The conference will be chaired by the Director. Copies of this letter will go to:

- OSM Albuquerque Field Office
- Associate Director
- Assistant Attorney General
- Compliance Coordinator
- file

#### 7. Pattern of Violations

- a. If the conference is not requested within 30 days, the Director will make a determination without benefit of a conference.
- b. If the conference is held, the Director will consider information from the conference and make a determination as to whether a pattern of violations exists.
- c. The Director will notify the operation of the findings. Copies of the letter will be sent to:
  - OSM Albuquerque Field Office
  - Associate Director
  - Assistant Attorney General
  - Compliance Coordinator
  - file
- d. If a finding of "no pattern of violations" is made, there will be no further action.
- e. If a finding of "existence of a pattern of violations" is made, the Division will petition the Board of Oil, Gas and Mining for an order to show cause as to why the permit should not be suspended or revoked.

#### 8. Board Hearing

- a. The Board will handle the Division's petition in accordance with its procedural rules.

Page 5

Memorandum - Mining Staff

Pattern of Violations Procedure

May 1, 1986

- d. If a consent order is reached prior to the hearing, the terms and conditions of the consent order will become a matter of public record.
- c. If the hearing is conducted before the Board, the testimony and order of the Board will be a matter of public record. The provisions of the Board order will be carried out by the Division, as applicable.

9. Review of Past Patterns of Violations - Statute of Limitations

- a. The above procedure will be expeditiously pursued for a review of past violations which may not have been reviewed.
- b. The statute of limitation for the Division determination of a pattern of violations is two years, based on Section 40-8-9(4), Utah Code Annotated. This means that the Division's finding must be made before the most recent of the violations comprising a pattern is two years old, based on the date of issuance of the violation.

jb

cc: R. H. Hagen  
Board of Oil, Gas & Mining  
R. W. Daniels  
M. C. Moench  
B. W. Roberts

0550V-1-5

ACT-015-025

12/01/90 - 01/01/92

ASSESSMENT

NOV/CO#

ISSUED DATE

VIOLATION TYPE

ASSESSMENT	NOV/CO#	ISSUED DATE	VIOLATION TYPE
proposed	* NOV N91-35-1-1	02/27/91	L Other
UNPAID 01	* NOV N91-26-4-3	04/19/91	L Other
	* HV N91-20-1-1	04/26/91	L Other
proposed	NOV N91-34-2-1	05/20/91	L Other
inal	* NOV N91-26-7-2	07/02/91	L Other
	* NOV N91-26-7-2	07/02/91	L Other
	NOV N91-40-1-1	11/15/91	L Other
proposed	NOV N91-35-8-1	12/04/91	L Other
	NOV N91-40-2-2	12/19/91	L Other

pending  
ag. concurrence  
of unwaranted  
failure to comply  
\* 9

LOWELL:

91-35-1-1 - PAID 6/21/91  
91-20-1-1 FINALIZED + 1/20/92  
DUE  
91-26-7-2 #2 PAID 10/25/91



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangerter

Governor

Dee C. Hansen

Executive Director

Dianne R. Nielson, Ph.D.

Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

July 25, 1991

TO: Lowell P. Braxton, Associate Director, Mining

FROM: Joseph C. Helfrich, Regulatory Program Coordinator

RE: Tracking System Review for the Months of July 1990 to July 1991

The preliminary pattern search for the months of July 1990 to July 1991, indicates that the referenced operator has accrued three or more, same or similar violations within the past twelve month period.

## Co-Op Mining Company

ACT/015/025

Violation	Issue Dates	Nature of Violation	Inspector	Status	Negligence
C90-26-1-1	11/02/90	Conducting mining and reclamation operations without a valid coal mining permit	Bill Malencik	Civil Penalty Paid 12/06/90; No Appeal	No Negligence; 0 Points
N90-34-1-1	11/26/90	Failure to accurately depict the surface facilities of the mining operation in the mining and reclamation plan	Jesse Kelley	Civil Penalty Paid 04/13/91; No Appeal	Negligence; 12 Points
N91-35-1-1	02/27/91	Failure to conduct mining and reclamation activities in accordance with the approved permit	Susan White	Civil Penalty Paid 06/21/91; No Appeal	Greater Degree of Fault; 23 Points
N91-20-1-1	04/26/91	Failure to comply with the terms and conditions of the approved mining and reclamation plan	Pamela Grubaugh-Littig	Finalized 07/05/91; Assessment Conference Pending	Greater Degree of Fault; 20 points
N91-26-7-2 2/2	07/02/91	Conducting mining and reclamation operations without a valid coal mining permit.	Bill Malencik	Proposed Assessment 07/23/91	Greater Degree of Fault; 25 points

Compliance records for NOV #N91-26-7-2 2/2 are provided.

jbe

A:\PATTSEAR.TRA

an equal opportunity employer



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangerter  
Governor

Dee C. Hansen  
Executive Director

Dianne R. Nielson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

May 15, 1992

CERTIFIED MAIL  
P 074 979 659

Mr. Wendell Owen  
Co-op Mining Company  
P. O. Box 1245  
Huntington, Utah 84528

Dear Mr. Owen:

Re: Notice Of Potential Pattern Of Violations By Co-op Mining  
Company At Its Bear Canyon Mine, ACT/015/025, Emery County,  
Utah

The purpose of this letter is to inform you that, in accordance with Utah Admin. R645-400-330, I have determined that Co-op Mining Company has a potential pattern of violations at its Bear Canyon Mine. Attached are copies of the reviews which form the basis for this determination. The Division procedure for determining a pattern of violations is also attached.

A determination of a pattern of violations includes two separate findings:

1. The permittee has incurred three or more violations of the same or related requirements of the State Program or the permit during a 12-month period (R645-400-332.100), and
2. Each of those violations was caused by the permittee willfully or through unwarranted failure to comply (R645-400-332.200).

In this case, the determination of a potential pattern of violations is based on the occurrence of violations N91-35-1-1, N91-20-1-1, and N91-26-7-2 (2 of 2). Other violations reviewed in conjunction with the determination include violations N91-26-7-2 (1 of 2), N91-35-8-1, N90-35-1-1, N90-25-1-1, and N91-26-4-3 (1 of 3).

Page 2  
Wendell Owen  
May 15, 1992

In accordance with Division procedure, Co-op Mining Company is now provided the opportunity to request an informal hearing to review the potential pattern of violations. The fact of the occurrence of three or more violations of same or similar requirements of the State Program or the permit is considered by the Division to be prima facie evidence because the three above-stated violation were all determined to have occurred and were not successfully appealed. It will be Co-op's burden or responsibility, if an informal conference is held, to prove that the violations were not caused by the permittee willfully or through unwarranted failure to comply.

An informal hearing will be held, if it is requested by Co-op Mining Company in writing to the Division within 30 days of receipt of this letter. If an informal hearing is not requested, the Division will request that the Board issue an Order To Show Cause as to why Co-op Mining Company's permit for the Bear Canyon Mine should not be revoked or suspended.

If you have any questions regarding these procedures or reviews, please contact me or Vicki Bailey at (801) 538-5340.

Please recognize that Co-op's failure to respond or prevail in this matter may result in the revocation or suspension of Co-op's permit to conduct coal mining activities at the Bear Canyon Mine.

Best regards,



Dianne R. Nielson, Ph.D.  
Director

Attachments

cc: E. Kingston  
K. Mangum  
L. Braxton  
P. Grubaugh-Littig  
J. Helfrich  
T. Mitchell  
R. Hagen  
W. Malencik



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangerter  
Governor

Dee C. Hansen  
Executive Director

Dianne R. Nielson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

July 25, 1991

TO: Lowell P. Braxton, Associate Director, Mining

FROM: Joseph C. Helfrich, Regulatory Program Coordinator

RE: Tracking System Review for the Months of July 1990 to July 1991

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## Co-Op Mining Company

ACT/015/025

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* N91-35-1-1	02/27/91	Failure to conduct mining and reclamation activities in accordance with the approved permit	Susan White	Civil Penalty Paid 06/21/91; No Appeal	Greater Degree of Fault; 23 Points
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* N91-26-7-2 2/2	07/02/91	Conducting mining and reclamation operations without a valid coal mining permit.	Bill Malencik	Proposed Assessment 07/23/91	Greater Degree of Fault; 25 points

Compliance records for NOV #N91-26-7-2 2/2 are provided.

Joe H.

BEFORE THE DIVISION OF OIL GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH

---ooOoo---

IN THE MATTER OF THE POTENTIAL :	FINDINGS, CONCLUSIONS
PATTERN OF VIOLATIONS, INCLUDING	AND ORDER
NOTICES OF VIOLATION N91-35-1-1, :	
N91-20-1-1, AND N91-26-7-2(#2),	
CO-OP MINING COMPANY, BEAR :	
CANYON MINE, ACT/015/025, EMERY :	INFORMAL HEARING
COUNTY, UTAH :	CAUSE NO. ACT/015/025

---ooOoo---

On July 8, 1992, the Division of Oil, Gas and Mining ("Division") held an informal hearing concerning the potential pattern of violations represented by the above-referenced Notices of Violation ("NOV"s). The informal hearing was held at the request of the operator/permittee Co-op Mining Company ("Co-op") and in accordance with Utah Admin. R645-400-332 and the Division policy ("Policy") entitled Procedure For Determination of Pattern Of Violations, Utah Code Ann. Section 40-10, as revised April 28, 1992. The purpose of the hearing is to provide an opportunity for Co-op to prove to the Division that the above-referenced NOV's were not caused by Co-op willfully or through unwarranted failure to comply. The following individuals attended the informal conference:

Presiding:	Dianne R. Nielson, Director Division of Oil, Gas and Mining
Petitioner: ("Co-op")	Carl Kingston, Esq. Counsel for Co-op Mining Company
	Wendell Owen Resident Agent Co-op Mining Company

*Division's*

**EXHIBIT**

#9



Eldon Kingston  
Co-op Mining Company

Kimly Mangum  
Mangum Engineering  
Consultant to Co-op Mining Company

Division: Lowell Braxton  
Associate Director for Mining

Pamela Grubaugh-Littig  
Permit Supervisor

Thomas A. Mitchell, Esq.  
Assistant Attorney General  
State of Utah  
Counsel for the Division

Board: Joe Helfrich  
Assessment Officer

The Findings, Conclusions, and Order in this matter are based on information provided in connection with this informal hearing and information in the files of the Division.

#### FINDINGS OF FACT

1. Notice of this hearing was properly given.
2. NOVs N91-35-1-1, N91-20-1-1, and N91-26-7-2(#2) have been identified by the Division as constituting a potential pattern of violations, in accordance with Utah Admin. R645-400-332 and the Policy.
3. NOVs N91-35-1-1, N91-20-1-1, and N91-26-7-2(#2) have been determined to have occurred. The fact of violation was not appealed in N91-35-1-1 and N91-26-7-2(#2). The fact of violation was appealed in N91-20-1-1, the fact of violation was upheld in an informal conference, and the informal order was not appealed.

4. In its consideration of whether the violations were caused willfully or through unwarranted failure to comply, the Division also reviewed other violations at the Bear Canyon Mine, including N91-26-7-2(#1), N91-35-8-1, N90-35-1-1, N90-25-1-1, and N91-26-4-3(31).

5. N91-35-1-1 was issued on February 27, 1991, based on an inspection conducted on February 22, 1991, for failure to conduct mining and reclamation activities in accordance with the approved plan, failure to include a detailed description of each road constructed, used or maintained within the permit area, and failure to remove topsoil from the area to be disturbed, in violation of Utah Admin. R614(645)-301-534.100 through 130, R614(645)-301-527.100, R614(645)-301-527.200 through 210, 230, and 240, R614(645)-301-232.100, and Utah Code Ann. 40-10-18(j). The unauthorized construction consisted of a road which was bladed from the top of the upper road (near upper pad) to the coal shoot where a hoist was installed.

6. With respect to N91-35-1-1, Wendell Owen stated that he gave Co-op employee Kevin Peterson specific directions as to how the coal was to be removed from around the coal shoot. According to Mr. Owen, the violation occurred because the employee did not follow Mr. Owen's directions.

7. The final assessment of NOV N91-35-1-1 included the assignment of 23 points for negligence. On a scale of 0-30 points, the range of 16-30 negligence points represents a greater degree of fault.

8. NOV N91-20-1-1 was written on April 26, 1991, for failure to operate in accordance and compliance with the terms and conditions of the permit, all applicable performance standards and requirements of the State Program, specifically for failure to submit all maps and information required by the Division Order issued November 27, 1990, items 8, 14, 17, and 18. Provisions violated were Utah Admin. R614(645)-300-143 and R614(645)-303-212. The determination of insufficiency of the maps which prompted the Division Order, was based on field inspections and review of plan maps and information. Because the violation was written for failure to comply with the Division order and by its nature did not require substantiation through a field inspection, an inspection was not conducted prior to issuance of the violation.

9. With respect to N91-20-1-1, Co-op believes that they attempted in good faith to redo the maps required in the Division Order. Co-op did not know that the Division would require new maps until the Division Order was written. Co-op anticipated that it would take 6-8 months to redo the maps. The Division originally required that the maps be submitted in 90 days. That deadline was extended to March 27, 1991, a period of approximately 4.5 months.

When the consultant who usually does Co-op's maps was unable to do the work, Co-op hired two other consulting groups to redo the maps. Co-op requested an additional extension, but the request was not timely made.

10. The final assessment of NOV N91-20-1-1 included the assignment of 20 points for negligence. On a scale of 0-30 points,

the range of 16-30 negligence points represents a greater degree of fault.

11. NOV N91-26-7-2(#2) was written on July 2, 1991, based on an inspection on July 1, 1991, for failure to obtain Division approval before enlarging the shop pad, in violation of Utah Admin. R614(645)-300-143.

12. With respect to N91-26-7-2(#2), Co-op stated that the objective was to clean out a pond. The material from the pond had previously been taken to another pad area. However, when the pond was enlarged, Co-op's plan did not designate where the material was to be taken. The material was used to enlarge a pad which had not been designated to receive the material. Wendell Owen was responsible for the work, but was not there when the work occurred.

13. The final assessment of NOV N91-26-7-2(#2) included the assignment of 25 points for negligence. On a scale of 0-30 points, the range of 16-30 negligence points represents a greater degree of fault.

#### CONCLUSIONS OF LAW

1. The occurrence of NOVs N91-35-1-1, N91-20-1-1, and N91-26-7-2(#2) constituted a potential pattern of three same or similar violations, as provided in Utah Admin. R645-400-332 and the Policy, thereby causing the opportunity for this informal hearing.

2. The presumption, in evaluating whether the

violations were caused by the permittee willfully or through unwarranted failure to comply, assumes that a person intends the probable and logical consequences of his actions. As provided in Utah Admin. R645-400-331, a finding of unwarranted failure to comply will be based upon a demonstration of greater than ordinary negligence on the part of the permittee. No evidence has been provided which rebuts this presumption.

3. The Director has reviewed the history of these three violations, N91-35-1-1, N91-20-1-1, and N91-26-7-2(#2), as required by Utah Admin. R645-400-332.300 and the Policy.

4. The violations in N91-35-1-1 and N91-26-7-2 were directly related to the willful and unwarranted failure of Co-op management to sufficiently supervise employees to ensure that the work was properly conducted in accordance with the approved plan. In both NOVs, the permittee was determined to have demonstrated greater than ordinary negligence.

5. NOV N91-20-1-1 was caused by Co-op's failure to meet a deadline for submission of maps and information. Failure of the permittee to diligently complete an abatement is not justification for extension of the abatement time, as delineated in Utah Admin. R645-400-324. However, there is reason to believe that the failure to timely abatement may have been caused by factors in addition to negligence or lack of diligence. In consideration of the work to be done and Co-op's efforts to complete that work, the nature of the response does not constitute a willful or unwarranted failure to comply.

6. The Director has considered the existence of a pattern of violations based on two or more Division inspections, as required by Utah Admin. R645-400-332.100 and the Policy.

7. NOVs N91-35-1-1 and N91-26-7-2(#2) constitute a pattern of violations caused by willful and unwarranted failure to comply, as defined by Utah Admin. R645-400-332.

ORDER

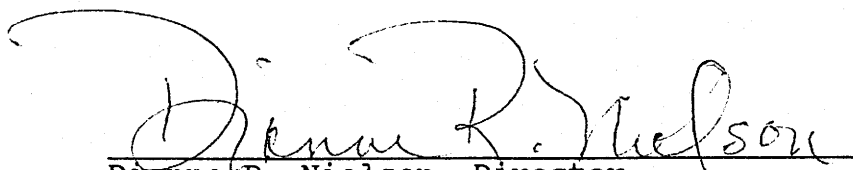
1. NOVs N91-35-1-1 and N91-26-7-2(#2) constitute a pattern of violations caused by willful failure to comply, as defined by Utah Admin. R645-400-332.100.

2. By this order, Co-op is notified of the Division's determination of a pattern of violations.

3. The Division hereby determines and recommends to the Board that an Order To Show Cause be issued pursuant to Utah Admin. R645-400-331, said Order To Show Cause to include a recommendation for a 48-hour suspension of mining operations.

4. Co-op has the right to an appeal of this Informal Order. That appeal is provided through the above-referenced Order to Show Cause. The Board will notify Co-op regarding the date of the formal hearing to consider the Order To Show Cause.

SO DETERMINED AND ORDERED this 27th day of July, 1992.

  
Dianne R. Nielson, Director  
Division of Oil, Gas and Mining  
State of Utah

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing FINDINGS, CONCLUSIONS AND ORDER for Cause No. ACT/015/025 to be mailed by certified mail, postage prepaid, the 28th day of July 1992, to the following:

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